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NO. 89-

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1989

W. R. BARKER, Superintendent, Columbus County Prison Unit, Brunswick, North Carolina, and LACY H. THORNBURG, Attorney General of the State of North Carolina,

Petitioners,

v.

WILTON HOWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **WHERE A CRIMINAL DEFENDANT ALLEGES THAT HE WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL BECAUSE OF A PRE-INDICTMENT DELAY BY THE GOVERNMENT IN SERVING HIS ARREST WARRANT, MUST THE DEFENDANT SHOW THAT THE DELAY WAS DELIBERATELY DESIGNED TO GAIN A TACTICAL ADVANTAGE?**

II. **AS A THRESHOLD MATTER, DOES THE FOURTH CIRCUIT'S DECISION, ADOPTING THE MINORITY VIEW THAT A DEFENDANT NEED NOT SHOW AN IMPROPER PROSECUTORIAL MOTIVE FOR PRE-INDICTMENT DELAY, CONSTITUTE A NEW RULE WHICH CANNOT BE GIVEN RETROACTIVE APPLICATION ON FEDERAL HABEAS REVIEW UNDER THIS COURT'S INTERVENING DECISION IN *TEAGUE v. LANE*, 489 U.S. 288 (1989)?**

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, W. R. Barker, Superintendent, Columbus County Prison Unit, Brunswick, North Carolina,[1] and the Honorable Lacy H. Thornburg, Attorney General of North Carolina [hereinafter "State"], by and through their undersigned counsel, Special Deputy Attorney General

1 Respondent Wilton Howell currently is under the custody of Superintendent Joseph Brooks at the Robeson Correction Center in Lumberton, North Carolina.

Barry S. McNeill, respectfully pray that a writ of certiorari issue to review the published decision of the United States Court of Appeals for the Fourth Circuit, filed on May 24, 1990, in *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990), or, alternatively, that the Fourth Circuit's decision be vacated and remanded for reconsideration in light of the intervening retroactivity decision in *Teague v. Lane*, 489 U.S. 288 (1989).

OPINION BELOW

This petition seeks review of the published decision by the United States Court of Appeals for the Fourth Circuit, which is reported at *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990), and which is reproduced in the Appendix at 1-31.

JURISDICTION

The jurisdiction of this Court to review the Fourth Circuit's decision of May 24, 1990 is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

At issue in this case are the following provisions of the Fifth Amendment to the United States Constitution:

> [N]or shall any person . . . be deprived of life, liberty, or property without due process of law;

and the Fourteenth Amendment to the Constitution, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The State seeks review of the Fourth Circuit's decision affirming the issuance of a writ of habeas corpus on behalf of the Respondent, Wilton Howell, ordering his retrial or release from custody due to pre-indictment delay in the service of his arrest warrant.

On Wednesday, September 19, 1979, shortly after 2:30 p.m., Ruby Carlyle, the 66-year-old, wheelchair-bound proprietor of a rural gas and grocery store in Bladen County, North Carolina, was robbed by two black men of approximately $1,200.00. Mrs. Carlyle reported to the investigating officers that the robbers were driving a dark-colored automobile, and that the robbers had been to her store earlier the same day. One of the robbers weilded a knife, and the other had "a long old-looking pistol."

Harold Hayes, a customer who was at the store during the robbers' first visit, saw a black male in the store and another at the gas pump by a black Chevrolet with chrome mag wheels, one of which had a missing lug.

Howell was known to drive a black two-door 1973 Chevrolet with mag wheels. On September 23, 1979, Patrolman H. O. Covington of the North Carolina State Highway Patrol undertook surveillance of Howell's residence and discovered a black Chevrolet parked near the back of the house. Patrolman Covington conducted a consent search of the vehicle, in which he found cash register keys, some small change, a divider from a cash drawer, a gas cap, and a knife. The investigating officers later conducted a consent search of Howell's home and found an "old timey," black powder muzzle-loading .38 caliber revolver of Civil War vintage.

At trial, Mrs. Carlyle identified both the knife and revolver as the weapons used by the robbers. Mr. Hayes identified the black Chevrolet as the car with the missing lug that he had observed at Mrs. Carlyle's store on the morning of September 19th.

On October 31, 1979, while Wilton Howell was being held on unrelated Robeson County charges, Mrs. Carlyle was taken to the Robeson County Jail and identified Howell from a line-up procedure as one of the men who robbed her. The next day, a warrant was issued for Howell's arrest in connection with the robbery. However, the warrant was not served because in Robeson County it was the practice to hold arrest warrants from other counties until all local proceedings had been completed.

Howell remained in the Robeson County Jail until the end of March 1980, when he was transferred to the North Carolina Department of Correction. He remained in the prison system until he was paroled in April of 1981. The robbery warrant was not served upon Howell until February 4, 1982, some 27 months after the warrant had been issued.

On March 22, 1982, a Bladen County Grand Jury returned a true bill of indictment charging Howell with the robbery with a dangerous weapon of Mrs. Ruby Carlyle in violation of N.C.G.S. §14-87 (Cum. Supp. 1979). That same day, Howell's counsel filed a pretrial motion to dismiss the indictment on grounds that Howell had been denied due process of law in violation of the United States Constitution because of the delay in serving the warrant. A state court hearing was held on the motion to dismiss at the May 10, 1982 Session of Bladen County Superior Court, before the Honorable Edwin S. Preston, Jr., Judge Presiding. At the conclusion of the evidence, Judge Preston denied the motion to dismiss, and on June 21, 1982 filed a written order

making findings of fact, including the following: that Howell was incarcerated in the Robeson County Jail on or about November 1, 1979; that Detective Phillip Little of the Bladen County Sheriff's Department requested the Robeson County Sheriff's Department to notify him upon disposition of the charges pending against Howell in Robeson County; that Howell remained incarcerated in the Robeson County Jail until February of 1980, at which time he was released; that during the months of November and December of 1979, and January and February of 1980, Detective Little received no information from the Robeson County Sheriff's Department; that between February of 1980 and February of 1982, Detective Little sent several inquiries to the Robeson County Sheriff's Department in an effort to locate Howell, but was unable to do so; that on or about February 4, 1982, Detective Little received a communication from the Robeson County Sheriff's Department, and as a result of the communication served the warrant upon Howell; and, that although Howell contended that he had worked at Ray Hunt's body shop and Hunt was unavailable to testify for him, Howell had offered no evidence of any efforts which he had made to locate Hunt, and that Hunt's sister currently lived in Lumberton, North Carolina. (App 32-34) Based on these findings, Judge Preston concluded that the delay between the issuance of the arrest warrant on November 1, 1979 and the service of the warrant on February 4, 1982 was not prejudicial to Howell in the conduct of his defense, and was not "unreasonable, unjustified, and **engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant such as to violate due process.**" (App 34) (emphasis added)

Howell was tried on the indictment at the October 11, 1982 Criminal Session of Bladen County Superior Court, before the Honorable Donald L. Smith, Judge Presiding. The jury found Howell guilty as charged and Judge Smith sentenced Howell to a term of "not less than nine years nor more than forty years in the custody of the North Carolina Department of Correction."

Howell gave notice of appeal and raised as his sole assignment of error that he had been denied due process of law and a speedy trial by the delay between the issuance and service of the arrest warrant. Holding that Howell had failed to show actual and substantial prejudice from the pre-indictment delay, on April 17, 1984, in an unpublished decision reported at *State v. Howell*, 67 N.C.App. 763, 314 S.E.2d 147 (1984), a panel of the North Carolina Court of Appeals affirmed Howell's conviction, finding no prejudicial error in his trial. (App 36)

On October 11, 1984, Howell filed a Motion for Appropriate Relief pursuant to N.C.G.S. §15A-1415 (1983) alleging again that the 27-month delay in serving the arrest warrant prejudiced him in that his alibi witness, Ray Hunt, who was available in November of 1979, left the State of North Carolina and his whereabouts were unknown to Howell at the time of his trial in October of 1982. An evidentiary hearing was held on the motion in Bladen County Superior Court before the Honorable B. Craig Ellis, Judge Presiding. On February 20, 1985, Judge Ellis made findings of fact from the evidence presented at the hearing, including that there was no evidence Wilton Howell or anyone acting in his behalf had attempted to locate Hunt's sisters or mother to determine Hunt's whereabouts in the State of Florida; that Hunt's name was given to Detective Little of the Bladen County Sheriff's Department, and Detective Little asked the Robeson County Sheriff's Department to try to locate him, but received no answer back; that although the

testimony of Hunt would have tended to corroborate Howell's employment at the body shop on the date of the robbery, it did not amount to new evidence or additional evidence; and, **that Howell had failed to establish that he used due diligence in his attempts to locate Hunt.** (App 37) (emphasis added) Judge Ellis specifically found that Hunt probably could have been located in the State of Florida with due diligence. (App 37) Based on these findings, Judge Ellis denied the post-conviction motion, concluding that Howell had failed to establish that the alleged newly discovered evidence was unknown or unavailable to him at the time of his trial. (App 37) The North Carolina Court of Appeals summarily denied Howell's Petition for Writ of Certiorari on December 19, 1985. (App 40)

On October 14, 1986, Howell filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Eastern District of North Carolina-Raleigh Division asserting the pre-indictment delay issue.

On March 8, 1988, United States Magistrate Alexander B. Denson issued a Memorandum and Recommendation agreeing with Howell's argument that he had been denied his constitutional rights to due process of law and a fair trial because of the State's 27-month delay in serving him with the arrest warrant. (App 39-52) Magistrate Denson recommended that a writ of habeas corpus be granted and that the indictment against Howell be dismissed. (App 52)

On March 29, 1988, Chief United States District Judge W. Earl Britt adopted the magistrate's conclusions and recommendation, except as to the indictment being dismissed. (App 53-54) Judge Britt agreed with the State that Howell would not be prejudiced by a retrial, and that the State should not be precluded from retrying him. Accordingly, Judge Britt issued a writ of habeas corpus directing that Howell be released from custody if not retried on the robbery with a dangerous weapon indictment by a designated date.

The State appealed, and on May 24, 1990 the Fourth Circuit panel, in a two-to-one panel decision, affirmed the District Court, rejecting the State's argument that Howell should have been required to show an improper prosecutorial motive in order to establish a due process violation based on pre-indictment delay. (App 1-16) Dissenting, Circuit Judge Russell would have found that Howell had failed to prove "actual prejudice," criticizing the majority and the District Court for failing to afford any deference to the state court finding that Howell had failed to use due diligence in attempting to locate his missing alibi witness. (App 17-29) As a second reason for reversal of the District Court, Judge Russell also agreed with the State that preindictment delay is only violative of due process if the delay was both prejudicial and intentional in order to "impair defendant's ability to defend himself or to gain a tactical advantage." (App 29-31)

REASONS WHY THE WRIT SHOULD ISSUE

I. THE FOURTH CIRCUIT'S HOLDING THAT A DEFENDANT NEED NOT SHOW IMPROPER PROSECUTORIAL MOTIVE TO PROVE A DUE PROCESS VIOLATION FROM PRE-INDICTMENT DELAY IS IN DIRECT CONFLICT WITH THIS COURT'S DICTA AND THE MAJORITY VIEW OF OTHER CIRCUITS, AND THEREFORE CERTIORARI REVIEW IS NECESSARY TO RESOLVE THIS CONTINUING CONFLICT ON AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW.

The Fourth Circuit panel, relying upon the two-pronged test announced in *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403-04 (4th Cir. 1985), concluded that the 27-month delay by the State in serving Wilton Howell with the warrant for his arrest denied him his Fifth Amendment right to due process of law. However, the panel majority failed to require Howell to show that the State intentionally delayed serving the warrant to gain some tactical advantage, or that the State displayed a reckless disregard of circumstances suggesting an appreciable risk that delay would impair his defense. Although conceding that in *United States v. Gouveia*, 467 U.S. 180, 192 (1984), this Court specifically stated that the Fifth Amendment requires dismissal of an indictment if a defendant can prove actual prejudice and intentional delay by the prosecution to gain an advantage over him, the panel dismissed such language as

"merely restating in *dicta* the established outer contour of unconstitutional preindictment delay." (App 12) Since the majority of the Circuit Courts which have considered this issue require such a showing of an improper prosecutorial motive, and even the Justices of this Court have alluded to this requirement to make out a due process violation, it follows that this Court should grant review to resolve this recurring, but as yet unsettled conflict. Supreme Court Rule 10.1(a).

The leading cases dealing with pre-indictment delay and what a defendant must show in order to make out a due process violation are *United States v. Marion*, 404 U.S. 307 (1971) and *United States v. Lovasco*, 431 U.S. 783 (1977). In *United States v. Automated Medical Laboratories, Inc.*, *supra*, Circuit Judge Sneeden, writing for the Fourth Circuit, discussed *Marion* and *Lovasco* at length, and interpreted these cases as establishing a two-pronged test for analyzing when pre-indictment delay violates due process:

> First, a court must assess whether the defendant has suffered actual prejudice, and the burden of proving such prejudice is clearly on the defendant. If the threshold requirement of actual prejudice is met, the court must then consider the Government's reasons for the delay, balancing the prejudice to the defendant with the Government's justification for delay. *United States v. Townley*, 665 F.2d 579, 582 (5th Cir. 1982), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982). The basic inquiry then becomes whether the Government's action in prosecuting after substantial delay violates "fundamental conceptions of justice" or "the community's sense of fair play and decency." *United States v. Lovasco*, 431

> and decency." *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 2049, 52 L.Ed.2d 752 (1977).

United States v. Automated Medical Laboratories, Inc., 770 F.2d at 403-04. Applying this test to the facts before him, Judge Sneeden concluded that even assuming some slight prejudice to AML from the loss of a witness's testimony due to the pre-indictment delay of approximately 45 months, there was no violation of due process where the Government's delay was justified by the lengthy administrative review process which was not necessarily geared toward criminal investigation, by the time required for the Government attorneys to become familiar with the complex case involving federal regulatory schemes, and by manpower problems within the United States Attorney's Office. *Id.* at 404. Although Judge Sneeden did not allude to the requirement of showing an improper prosecutorial motive in the two-prong test itself, he noted under his analysis of the Government's reasons for the delay the following:

> Certainly there is no indication that the Government intentionally delayed to gain some tactical advantage, *United States v. Marion*, 404 U.S. 307, 325, 92 S.Ct. 455, 466, 30 L.Ed.2d 468 (1971), or even that the delay was incurred in "reckless disregard of circumstances...suggesting that the delay would impair the ability to mount an effective defense." *United States v. Lovasco*, 431 U.S. 783, 795 n. 17, 97 S.Ct. 2044, 2051 n. 17, 52 L.Ed.2d 752 (1977).

Id. at 404.

The panel majority (Chief Judge Ervin and United States District Judge Kiser of Virginia, sitting by designation) chose to ignore the suggestion in *Automated Medical Laboratories, Inc.* that, at the very least, the presence or absence of an improper prosecutorial motive is a factor in the analysis and weighing of the government's reason for delay. The panel has taken, in effect, the minority view in its interpretation of *Gouveia*. Judge Kiser, writing for the panel majority, holds that *Lovasco* and *Marion* do not establish "a black-letter test" for determining if prosecutorial preindictment delay violates the Due Process Clause of the Fifth Amendment:

> [I]n both *Lovasco* and *Marion*, the Supreme Court made it clear that the administration of justice, vis-a-vis a defendant's right to a fair trial, necessitated a case-by-case inquiry based on the circumstances of each case.
>
> [W]e cannot agree with the position taken by the State of North Carolina and those other circuits which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation.

(App 14)

The majority of the circuits, however, interpret this Court's decisions in *Lovasco*, *Marion*, and *Gouveia* as requiring such a showing of prosecutorial misconduct designed to obtain a tactical advantage over the defendant or to advance some other impermissible purpose. *E.g.*, *United States v. Benson*, 846 F.2d 1338, 1342-43 (11th Cir. 1988); *United States v. Fuesting*, 845 F.2d 664, 669 (7th Cir.

1988); *United States v. Ismaili*, 828 F.2d 153, 166-67 (3rd Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), *cert. denied*, 484 U.S. 1035 (1988); *United States v. Labron-Gonzalez*, 816 F.2d 823, 831 (1st Cir.), *cert. denied*, 484 U.S. 843 (1987); *United States v. Jones*, 816 F.2d 1483, 1488 n. 2 (10th Cir. 1987); *United States v. Atisha*, 804 F.2d 920, 928-29 (6th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987); and, *United States v. Bliss*, 735 F.2d 294, 300 (8th Cir. 1984). *But see Dickerson v. Louisiana*, 816 F.2d 220, 229 n. 16 (5th Cir.), *cert. denied*, 484 U.S. 956 (1987); *United States v. Carlock*, 806 F.2d 535, 549 (5th Cir. 1986), *cert. denied*, 480 U.S. 950 (1987). Only two circuits, the Ninth and now the Fourth in the instant case, affirmatively take the minority position that a defendant need not prove an improper prosecutorial motive. *See United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986).

The dicta in two recent decisions of the United States Supreme Court supports the conclusion, contrary to the Fourth Circuit's, that a defendant must show the government's delay was deliberately designed to gain a tactical advantage. In *United States v. Gouveia, supra*, former Justice Rehnquist, now Chief Justice, stated the test as follows:

> [T]he Fifth Amendment requires the dismissal of an indictment...**if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him** and that it caused him actual prejudice in presenting his defense.

467 U.S. at 192 (emphasis added). Similarly, in *United States v. MacDonald*, 456 U.S. 1 (1982), Justice Marshall, in his dissenting opinion, made the following relevant

comments about the protections of the Due Process Clause against purposeful or tactical delay that cause the accused actual prejudice at trial:

> The due process constraint is limited, and **does not protect against delay which is not for a tactical reason** but which serves no legitimate prosecutorial purpose.

456 U.S. at 20 (emphasis added). Consequently, even the Justices of this Court appear to require a showing of prosecutorial misconduct designed to obtain a tactical advantage over the defendant or to advance some other impermissible purpose in order to establish a due process violation.

The conflict among the circuits on this issue has not gone unnoticed. In his dissent from the denial of certiorari in *United States v. Hoo*, *supra*, Justice White alluded to the significant disagreement in the lower courts over the proper test for determining if prosecutorial preindictment delay amounts to a due process violation, and commented:

> The continuing conflict among the Circuits on this important question of constitutional law requires resolution by this Court; I would grant certiorari.

Hoo v. United States, 484 U.S. 1035, 1036 (1988) (White, J., dissenting from denial of certiorari).

If the Fourth Circuit had applied the correct test, it would have been compelled to conclude that Howell had failed to make out a due process violation since there was absolutely no allegation or showing that the delay by the State was to gain a tactical advantage over him. There was no evidence that Detective Little or any of the other Bladen

County officers were aware that Howell's witness, Ray Hunt, would close up his body shop business and leave North Carolina. As noted by the District Court, the delay in serving Howell with the arrest warrant was due to the charges pending against Howell in Robeson County. (App 50) The Bladen and Robeson County officials decided not to serve the warrant for Howell's arrest until after the disposition of the Robeson County charges.

> The Robeson County officials "did not want to have to release [Howell] for various Bladen court appearances and transport him back and forth during the pendency of their proceedings." Response to Interrogatories at 5. The general practice in Robeson County was to hold warrants until the other county was finished. Response at 15. It was for this reason that Detective Little did not attempt to serve [Howell] with the arrest warrant immediately after its issuance even though the detective knew that [Howell] was in the Robeson County jail on the very day the arrest warrant was issued. During 1980 and 1981, Detective Little did not try to serve the warrant issued to him by the magistrate because Robeson [County] was not through with [Howell]. Response at 4.

(App 50) After Howell had been released from State custody in April of 1981, Detective Little was misinformed by the North Carolina Department of Correction that Howell had escaped, and therefore no attempt was made to serve Howell until February 4, 1982 when he was arrested after making a complaint at the Robeson County Sheriff's Department in an unrelated matter. (App 50) At the pre-trial hearing on Howell's motion to dismiss the indictment for delay, Detective Little denied that the delay in serving the arrest

warrant was intended to prejudice Howell's rights. From the evidence presented at this pre-trial hearing, Judge Preston found that the delay was **not** "unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily **in order to gain tactical advantage over the defendant** such as to violate due process." (App 33-34) (emphasis added) On federal habeas corpus review, 28 U.S.C. §2254(d) requires a federal court to afford a "presumption of correctness" to such a state court's finding of fact. *See Sumner v. Mata*, 449 U.S. 539 (1981).

Therefore, even assuming that Howell could demonstrate actual prejudice from the delay, the Fourth Circuit erred in affirming the grant of habeas relief by incorrectly interpreting *Lovasco*, *Marion*, and *Gouveia*. Unlike the State court and the majority of the circuits, the Fourth Circuit panel failed to require Howell to show that the delay was designed to obtain a tactical advantage over him. This Court should grant review on certiorari to resolve this conflict.

II. THE FOURTH CIRCUIT'S PRONOUNCEMENT CONSTITUTES A NEW RULE WHICH CANNOT BE GIVEN RETROACTIVE APPLICATION ON FEDERAL HABEAS REVIEW, AND THEREFORE ITS DECISION SHOULD BE VACATED AND REMANDED FOR RECONSIDERATION IN LIGHT OF *TEAGUE V. LANE*, 489 U.S. 288 (1989).

Wilton Howell's habeas appeal was argued before the Fourth Circuit in 1988, well before this Court announced the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). Although the issue of retroactivity was not raised

or addressed by the parties in either the District Court or the Fourth Circuit, in light of the intervening decisions in Teague and its progeny it is necessary to decide, as a threshold matter, whether the minority view adopted by the Fourth Circuit is a "new rule" which cannot apply retroactively on federal habeas review.[2] *See Sawyer v. Smith*, ____ U.S. ____, 58 U.S.L.W. 4905 (June 21, 1990); *Saffle v. Parks*, 494 U.S. ____, 110 S.Ct. 1257 (1990); and, *Butler v. McKellar*, 494 U.S. ____, 110 S.Ct. 1212 (1990).

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2 In *Teague*, Justice O'Connor clearly stated that "[r]etroactivity is properly treated as a **threshold** question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague v. Lane*, 489 U.S. at 300. *Accord Saffle v. Parks*, 494 U.S. ____, ____, 110 S.Ct. 1257, 1259 (1990); *Penry v. Lynaugh*, 492 U.S. ____, ____, 109 S.Ct. 2934, 2944 (1989). However, the *Teague* rule is not "jurisdictional," and therefore must be relied upon by the government; the Court will not decide the issue *sua sponte*. *Collins v. Youngblood*, ____ U.S. ____, 58 U.S.L.W. 4855 (June 21, 1990). *Compare Moore v. Zant*, 885 F.2d 1497, 1519 n. 5 (11th Cir. 1989) (*en banc*) (Kravitch, J., dissenting) (*Teague* not an affirmative defense), and, *id.* at 1524 (Johnson, J., dissenting) ("It appears that non-retroactivity is an affirmative defense.") *Cf. Hanrahan v. Greer*, 896 F.2d 241, 245 (7th Cir. 1990 (Illinois forfeited retroactivity as defense by raising it for the first time on appeal.

In *Teague*, this Court defined a new rule as a legal principle that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "**dictated** by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. at 301 (emphasis in original). By adopting the minority position and holding that a habeas petitioner such as Howell need not prove improper prosecutorial motive to make out a due process violation from pre-indictment delay, the Fourth Circuit necessarily creates a "new rule" under *Teague*. At the time Howell's conviction became final in 1984, there were no indications in this Court's decisions that proof of improper prosecutorial motive was unnecessary under *Lovasco* and *Marion*. In fact, in both *Gouveia* and *MacDonald* Justices of this Court had recognized the requirement that a defendant must show the government's delay deliberately was designed to gain a tactical advantage. *United States v. MacDonald*, 456 U.S. at 20 (Marshall, J., dissenting); *United States v. Gouveia*, 467 U.S. at 192 (Rehnquist, J.). Moreover, as demonstrated above, the majority of the circuits do require proof of an improper prosecutorial motive, thereby suggesting that the proper test is, at a minimum, debatable among reasonable minds and therefore was not "dictated" for new rule retroactivity purposes. *See Butler v. McKellar*, 494 U.S. at ____, 110 S.Ct. at 1217-19. Finally, the "new rule" announced by the Fourth Circuit does not come within either of the two narrow exceptions under *Teague*. *See Sawyer v. Smith*, ____ U.S. at ____, 58 U. S. L.W. at 4909-10; *Saffle v. Parks*, 494 U.S. at ____, 110 S.Ct. at 1263-64; and, *Butler v. McKellar*, 494 U.S. at ____, 110 S.Ct. at 1218. Consequently, given the intervening decisions by this Court on retroactivity, this case should be vacated and remanded for reconsideration in light of *Teague v. Lane, supra.*

CONCLUSION

For the foregoing reasons, the State respectfully prays and requests that a writ of certiorari issue to review the decision of the Fourth Circuit granting Wilton Howell a writ of habeas corpus on this important issue of constitutional law. Alternatively, this case should be vacated and remanded to the Fourth Circuit for reconsideration in light of *Teague v. Lane, supra.*

Respectfully submitted,

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No. 89-

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

W. R. BARKER, Superintendent,
Columbus County Prison Unit,
Brunswick, North Carolina,

Petitioners,

v.

WILTON HOWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-7106

WILTON HOWELL,

Petitioner - Appellee,

versus

W. R. BARKER; ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA,

Respondents - Appellants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Chief District Judge. (CA-86-1072-HC)

Argued: October 31, 1988 Decided: May 24, 1990

Before ERVIN, Chief Judge, RUSSELL, Circuit Judge, and KISER, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed and remanded by published opinion. Judge Kiser wrote the majority opinion, in which Chief Judge Ervin joined. Judge Russell wrote a dissenting opinion.

ARGUED: Barry Steven McNeill, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants. Geoffrey Carlyle Mangum, Winston-Salem, North Carolina, for Appellee. ON BRIEF: Lacy H. Thornburg, Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants.

KISER, District Judge:

The appellee, Wilton Howell, filed this petition for writ of habeas corpus in the United States District Court for the Eastern District of North Carolina on October 14, 1986. As a ground for relief, he asserts a due process violation arising out of a delay by the Bladen County Sheriff's Department in the service of his arrest warrant and the return of an indictment for robbery with a dangerous weapon, as a result of which he was unable to locate an alibi witness for use at his trial.[1] The petition for writ of habeas corpus was first heard by Magistrate Alexander Denson, who recommended that the petition for habeas relief be granted and the indictment against Howell be dismissed. The district court, on objections to the magistrate's recommendations, affirmed the magistrate's finding of a due process violation, but rejected the magistrate's remedy. The district court held that the writ should issue and ordered a retrial. *Howell v. Barker*, 684 F. Supp. 132 (E.D.N.C. 1988). The State of North Carolina appealed. We affirm.

Facts and Procedural History

On the afternoon of September 19, 1979, Ms. Ruby Carlyle, a 66-year-old woman confined to a wheelchair, was robbed of approximately $1000 at gunpoint and knifepoint by two young black males at her rural gas and grocery store in Bladen County,

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1 There was no contention of any unnecessary delay after the arrest and indictment of appellee. Such delay as there was after indictment resulted from the motions of the appellee and need for evidentiary hearings on such motions. Except for the delay caused by the appellee himself, there was no unnecessary delay in processing the appellee's prosecution after his indictment. The appellee raised claims of other alleged errors in his trial, but he has limited his appeal to the alleged error in prosecutorial delay.

North Carolina. The Bladen County Sheriff's Department investigated the robbery. Ms. Carlyle told the investigating officers that the robbers were driving a black Chevrolet and that, earlier in the day, the robbers had been at the store in the car. Harold Hayes was at Ms. Carlyle's store at the time of the robbers' first visit. He saw a black male in the store and another at the pump by a black Chevrolet with mag wheels, one of which had a missing lug on the back wheel.

The black car driven by the robbers became a significant clue. Patrolman Covington of the North Carolina highway patrol was familiar with a black Chevrolet, usually driven by appellee, Wilton Howell, which had mag wheels. Covington undertook a surveillance of Howell's house and discovered a black Chevrolet parked at the back of the house. Covington conducted a consent search of the car in which he found cash register keys, some small change, a divider from a cash drawer, a gas cap, and a knife.[2] A consent search of Howell's home was also conducted, and a .38 caliber revolver was discovered.[3]

On October 31, 1979, Detective Phillip Little of the Bladen County Sheriff's Department interrogated Howell with respect to the Carlyle robbery at the Robeson County jail where Howell was being held on unrelated charges. Later that day,

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2 Ms. Carlyle testified that the knife looked like the knife the robber used to threaten Ms. Wilkins.

3 At trial, Ms. Carlyle identified both the gun and the knife as the weapons used during the robbery. At trial, Harold Hayes was shown photographs of the car found at Howell's residence by Patrolman Covington. Hayes identified the black Chevrolet as the car with the missing lug that he had seen on the morning of September 19 at Ms. Carlyle's store.

Howell appeared before Ms. Carlyle in a line-up.[4] Ms. Carlyle identified Howell as a man who looked like one of the robbers. On November 1, 1979, Detective Little obtained a warrant for the arrest of Howell on a charge of robbery with a dangerous weapon. Bladen County and Robeson County are adjacent to each other, and the county seats of the two counties are less than thirty miles apart. However, Detective Little did not serve the arrest warrant on Howell because he was aware that it was the practice of Robeson County officials to hold arrest warrants from other counties until all Robeson County proceedings were completed. This practice was followed in order to avoid the inconvenience and expense of transporting the wanted person back and forth between the two counties for hearings and trials.

Howell remained in the Robeson County jail until March 1980, when he was delivered to and placed in the custody of the North Carolina Department of Corrections. He remained in the prison system until he was paroled in April 1981. At no time during these periods of incarceration did the Bladen County authorities serve or attempt to serve the arrest warrant for the Carlyle robbery on Howell. No one in the Bladen County Sheriff's Department knew of Howell's whereabouts until February 2, 1982, when Howell appeared at the department to request the return of the gun that had been seized in the 1979 search. Howell was served with the November 1, 1979, arrest warrant on February 4, 1982, some 27 months after the warrant had been issued.

On March 22, 1982, a Bladen County grand jury returned a true bill against Howell on a charge of robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87 (Cum. Supp. 1979). Howell filed a motion to dismiss the indictment in the Superior Court of Bladen County on the grounds that he had been denied due process because of the delay in serving the arrest war-

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4 Howell was represented by retained counsel at the line-up. The fairness of the line-up has never been questioned.

rant which resulted in the unavailability of his alibi witness, Ray Hunt. Judge Edwin Preston granted an evidentiary hearing, which was held on May 10, 1982. On May 12, 1982, Judge Preston entered an order denying the motion to dismiss. Judge Preston made the following findings of fact:

> 12. That on or about September 19, 1979, the defendant was employed by the City of Lumberton and Hunt's Body Shop in Lumberton, North Carolina;
>
> 13. That the defendant contends that he was working with Roy [sic] Hunt at the time of said robbery alleged to have occurred on September 19, 1979; and defendant contends that Roy [sic] Hunt is unavailable to testify for the defendant; that defendant has offered no evidence of any efforts which he has made to locate Roy [sic] Hunt.

Upon the basis of these findings of fact, Judge Preston concluded as a matter of law:

> [T]he delay between the issuance of the arrest warrant on November 1, 1979 and the service of the warrant on the defendant on February 4, 1982 was not prejudicial to the defendant in the conduct of his defense; nor was said delay unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant such as to violate due process.

The case proceeded to trial and Howell was convicted of armed robbery on October 12, 1982. Howell appealed the conviction, claiming that the preindictment delay of approximately two years and four months was unreasonable and denied him due process of law and the right to a speedy trial. The North Carolina

Court of Appeals rejected both of Howell's arguments and affirmed the judgment of conviction.[5] *State v. Howell*, 67 N.C. App. 763, 314 S.E.2d 147 (1984). In connection with Howell's claim that the preindictment delay constituted actual and substantial prejudice because of the resultant unavailability of Howell's alibi witness, the court stated:

> Defendant has failed to show any tactical disadvantage because he could not locate Roy [sic] Hunt, an alibi witness; what he did to locate him, or that he is [sic] lost due to the preindictment delay; or that the witness would have significantly aided his defense. Defendant at most has demonstrated only potential prejudice, not actual prejudice.

On October 11, 1984, Howell filed a motion for appropriate relief in which he again alleged that the 27-month delay in serving his arrest warrant prejudiced him in that his alibi witness, Ray Hunt, who was unavailable in November 1979, could not be located at the time of trial in October 1982. A plenary hearing on Howell's motion for relief was held before Judge Craig Ellis on February 18, 1985. Judge Ellis dismissed the motion based on these express findings:

> (3) That at the plenary hearing on February 18, 1985, the petitioner, Wilton Howell, testified that he asked in 1982 after the warrant was served on him in February, of 1982, to have Mr. Hunt lo-

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5 The Court of Appeals found that the sixth amendment right to a speedy trial had no application to the defendant because the right was not triggered until the defendant was formally accused by indictment, information, or arrest.

cated; and that his brother looked for Mr. Hunt, but could not find Mr. Hunt; that Mr. Hunt had moved to Florida.

(4) That Stacy Howell, brother of petitioner, testified that he and Mr. Jack E. Carter tried to locate Ray Hunt after his brother was arrested in 1982; and that Stacy Howell talked with Charlie Matamoros, a relative of Mr. Hunt; that Mr. Hunt was supposed to have moved to Florida and he did not know where.

(5) That George Ray Hunt testified that in September, of 1979, he was operating Ray's Body Shop on West Fifth Street in Lumberton, North Carolina; that he knew the petitioner; that the petitioner was working with him at that time; that on September 19, 1979, the petitioner was working for him and came to work early that day from his job with the City of Lumberton; that George Ray Hunt paid Wilton Howell for his work that week in an amount larger than he usually paid him; that the petitioner was at work that day until 5:00- or 6:00 o'clock p.m.; and that Mr. Howell did not leave the body shop that day.

(6) That Mr. Hunt testified that he has six sisters; that none of them live in Lumberton, but one did live in Lumberton in 1982; and that the sister should have known what his address was in Florida.

(7) That Mr. Hunt is now residing in Robeson County. That there is no evidence that Mr. Howell or anyone acting in his behalf attempted to locate Mr. Hunt's sisters or mother to determine the location of Mr. Hunt in the State of Florida.

(8) That the name of Mr. Hunt was given to Mr. Phillip Little of the Bladen County Sheriff's Department; and that Mr. Little asked the Robeson County Sheriff's Department to try to locate him, but received no answer back.

(10) That the testimony of Mr. Hunt would tend to corroborate the testimony of Wilton Howell as to his employment on the date of the alleged robbery, but that it does not amount to new evidence or additional evidence.

(11) That Mr. Howell has not established that with due diligence he attempted to locate Mr. Hunt, and the Court finds that with due diligence Mr. Hunt could probably have been located in the State of Florida.

Howell petitioned for certiorari review of Judge Ellis' decision but the Supreme Court of North Carolina denied the writ.

After exhausting his state remedies, Howell filed this petition for writ of habeas corpus on October 14, 1986. Howell alleges that his constitutional rights have been violated because (1) he was denied a speedy trial, (2) he was not served with the arrest warrant until 27 months after the warrant's issuance, (3) his due process rights were violated by the mishandling of the testimony of a state witness, and (4) his motion to suppress the

prosecuting witness' identification of him was denied. The case was referred to United States Magistrate Alexander Denson who disposed of the matter on the record of the evidentiary proceedings in the state court.

In his report and recommendation, the magistrate recognized that a party seeking due process relief under the fifth amendment because of the unavailability of a material witness at trial has the burden of establishing that he was prejudiced. In order to make a showing of prejudice, Howell was required to (1) identify "the lost witness," (2) "demonstrate the content of the witness' testimony," and (3) "show that efforts were made to locate" the witness. The magistrate found that Howell had satisfied requirements (1) and (2). In connection with requirement (3) the magistrate reviewed the evidentiary hearings in the state court proceedings and found "that petitioner [Howell] did make a reasonable and diligent effort to locate Hunt prior to his trial."

The magistrate based this finding on the testimony of Wilton Howell's brother, Stacy Howell, who testified that Wilton's lawyer had asked him to find George Ray Hunt. Stacy testified that he asked Hunt's brother-in-law, Charlie Matamoros, for Hunt's address. Matamoros told Stacy that Hunt lived in Florida but he did not have his address. The State of North Carolina contended that Howell failed to demonstrate that he made an effort to locate Hunt because he did not ask Hunt's mother or sister for Hunt's address. The magistrate rejected the state's position because it failed to establish that Howell or his brother knew Hunt's mother or sister.

After finding that Howell had established prejudice, the magistrate balanced the prejudice to Howell with the State of North Carolina's reasons for the delay. The magistrate concluded that:

> [The] delay both in serving the arrest warrant and in indicting Petitioner [Howell] was the result of a **conscious decision** by Bladen County authorities. The only reason for the delay in serv-

> ing the arrest warrant (an act which certainly would have started Petitioner's speedy trial clock), was an interest in conveniencing the Robeson County authorities. Convenience to prison and law enforcement officials cannot override a defendant's constitutional right to due process and a fair trial regardless of the fact that such a defendant is imprisoned on another matter.
>
> The record . . . establishes that by November 1, 1979, the prosecuting authorities had completed their investigation into the Carlyle robbery. By the first of November, all physical evidence had been obtained, and witnesses to the robbery had been interviewed, the prosecuting witness had identified Petitioner from a lineup, and Petitioner's location had been determined . . . . There is no satisfactory excuse offered for the lack of diligence in serving Petitioner with the arrest warrant.

Thus, the magistrate recommended that Howell's petition for habeas relief be granted and the indictment be dismissed.

On March 29, 1988, the United States District Court for the Eastern District of North Carolina adopted the magistrate's report, but determined that the remedy was "inappropriate." The district court granted the writ of habeas corpus conditionally and ordered that Howell be released if the State of North Carolina had not commenced a retrial prior to May 28, 1988.

On April 20, 1988, the State of North Carolina filed its notice of appeal. On April 29, 1988, North Carolina filed a motion for stay of execution of the writ issued by the district court which this Court granted. North Carolina argues on appeal that the district court erred in failing "to require Howell to show that

the state intentionally delayed serving the warrant to gain some tactical advantage, or that the state displayed even a reckless disregard of circumstances suggesting an appreciable risk that delay would impair the defense."

Discussion

We first note that, in its brief on appeal, North Carolina failed to address the issue of actual prejudice. Instead, North Carolina chose to devote its entire discussion to the alleged requirement that a defendant, in order to establish a due process violation for preindictment delay, must prove improper prosecutorial motive in addition to actual prejudice.[6] We further note that in reviewing the tape of oral argument before this Court, all colloquies between the Court and counsel for the State of North Carolina **assumed** that the 27-month preindictment delay actually prejudiced the defendant, and focused instead on the alleged requirement of improper prosecutorial motive. Therefore, given this Court's assumption, and counsel for the State of North Carolina's both affirmative and tacit concession that the 27-

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6 North Carolina stated the issue as follows:

> Whether the district court erred in granting appellant Wilton Howell a writ of habeas corpus based on his claim that he was denied his rights to due process of law and a fair trial because of a 27-month delay by the state in seving him with the warrant for his arrest, where there is no showing that the delay was for the purpose of causing Howell to lose his alibi witness or to gain other deliberate tactical advantage.

month preindictment delay actually prejudiced the defendant, the issue of actual prejudice need not be addressed.[7] Thus, the remaining issue, after proving actual prejudice, is whether a defendant seeking due process relief from preindictment delay must further prove improper prosecutorial motive as the cause for the delay.

The State of North Carolina argues that a defendant must show both actual prejudice and improper prosecutorial motive to gain due process relief for preindictment delay. As support, North Carolina cites decisions from a number of circuits, as well as the Supreme Court's decision in *United States v. Gouveia*, 467 U.S. 180 (1984). Though we agree that other circuits have reached conclusions similar to the position advanced by North Carolina, we disagree that *Gouveia* is clear precedent. Granted, in *Gouveia*, the Supreme Court stated that the fifth amendment requires dismissal of an indictment if a defendant proves actual prejudice and intentional delay by the prosecutor to gain an advantage over the defendant. *Gouveia*, 467 U.S. at 192. The Court, however, was merely restating in *dicta* the established outer contour of unconstitutional preindictment delay.[8]

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7 Judge Russell disagrees with the majority's position on this issue and finds error in the district court's adoption of the magistrate's recommendation because it gave no deference to the finding of no actual prejudice by the state court. The majority's position is that deference to the state court findings of fact is not necessary because North Carolina conceded the fact of actual prejudice in its brief and at oral argument. *See Fowler v. Rhode Island*, 345 U.S. 67, 69 (1952) (concession made at oral argument by the State of Rhode Island was fatal to the state's case).

8 The issue the Court addressed in *Gouveia* was the parameters of the sixth amendment right to an attorney as it applied to inmates being held in administrative detention pending indictment for crimes committed while in prison. *Gouveia*, 467 U.S. 182.

The Supreme Court addressed the due process ramifications of preindictment delay in *United States v. Lovasco*, 431 U.S. 783, 797 (1977), and *United States v. Marion*, 404 U.S. 307, 325 (1971). In both of these cases, the Supreme Court concluded that based on the particular facts of each case, the preindictment delay involved did not violate the defendant's due process rights. In *Marion*, the Court agreed with the government's concession that intentional delay by the government to gain tactical advantage over the defendant, in addition to substantial prejudice to the defendant, would violate due process. *Marion*, 404 U.S. at 324-25. The Court cautioned, however, that:

> [W]e need not, and could not now determine when and in what circumstances actual prejudice resulting from preaccusation delays requires dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of a defendant to a fair trial will necessarily involve a delicate judgment **based on the circumstances of each case**.

Id. (emphasis added).

In *Lovasco*, the Court held that investigative delay, as opposed to intentional delay undertaken to gain tactical advantage,[9] would not violate due process. *Lovasco*, 431 U.S. at 795-96. The *Lovasco* Court also noted that there is little guidance to be given lower courts who are left with the task of applying the principles of due process "to the particular circumstances of individual cases" to determine whether a defendant has been prejudiced by preaccusation delay. *Id.* at 796-97.

Therefore, in both *Lovasco* and *Marion*, the Supreme Court made it clear that the administration of justice, vis-a-vis a defendant's right to a fair trial, necessitated a case-by-case inquiry based on the circumstances of each case. Rather than establishing a black-letter test for determining unconstitutional preindictment delay, the Court examined the facts in conjunction with the basic due process inquiry: "whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' . . . and which define 'the community's sense of fair play and decency.'" *Lovasco*, 431 U.S. at 790 (citations omitted); *see United States v. Automated Medical Laboratories*, 770 F.2d 399, 404 (4th Cir. 1985).

Applying these principles of due process to the case at hand, we cannot agree with the position taken by the State of North Carolina and those other circuits which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation. Taking this position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant

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9 The *Lovasco* Court noted, however, that a due process violation could be made out "upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." *Lovasco*, 431 U.S. at 795 n. 17.

cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive.

The better position, and the one previously taken by this Circuit in *United States v. Automated Medical Laboratories, supra*, is to put the burden on the defendant to prove actual prejudice. Assuming the defendant can establish actual prejudice, then the court must balance the defendant's prejudice against the government's justification for delay. *Automated Medical Laboratories*, 770 F.2d at 403-04. "The basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.'" *Id.* at 404 (citations omitted).

In the case at bar, actual prejudice is assumed and conceded; thus, the defendant's due process claim is ripe for adjudication. *See Lovasco*, 431 U.S. at 789 ("proof of actual prejudice makes a due process claim concrete and ripe for adjudication . . . ."). Under *Automated Medical Laboratories*, we next must balance the defendant's prejudice against North Carolina's justification for delay. At oral argument, counsel for the State of North Carolina unequivocally and candidly stated that North Carolina's justification for the preindictment delay was mere convenience, and that North Carolina was "negligent" in not prosecuting the defendant earlier. North Carolina makes no assertion that the defendant's case was particularly complicated, or that the state was engaged in preindictment investigation. On balance, therefore, there is no valid justification in this case for the preindictment delay that prejudiced the defendant.

Accordingly, the district court's decision granting the defendant's petition for a writ of habeas corpus because of the unconstitutional preindictment delay is affirmed. At oral argument, counsel for the defendant and counsel for the State of North

Carolina expressed their belief that the defendant could get a fair retrial. Thus, the district court's order that the execution of the writ be conditioned upon the failure of North Carolina to retry the defendant by a certain date is also affirmed. This case is hereby remanded to the district court to set a date by which the defendant's retrial must be commenced.

AFFIRMED AND REMANDED

RUSSELL, Circuit Judge, dissenting:

I dissent from the majority opinion herein. I, howevr, accept substantially the statement of facts as stated on pages 1-10 of the majority opinion, except for its second paragraph on page 10 and for certain additions I later indicate.

I shall attempt to state the reasons for my dissent. I begin by noting first the petitioner's claim as stated in his habeas petition filed in the district court. In that habeas petition, the petitioner alleged a due process violation of his right "to a fast and speedy trial in that such denial resulted in the unavailability of witnesses to testify in behalf of petitioner."[1]

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1 The petitioner's assertion of a Sixth Amendment violation is extensively discussed in the magistrate's opinion. The magistrate indicated doubt whether delay prior to the issuance of an arrest warrant and prior to an arrest triggered the Speedy Trial Clause of that amendment. He, however, seemed inclinded to the view that the Clause covered the period between the issuance of the arrest warrant and the actual arrest. In my opinion, that question was settled in United States v. McDonald, 456 U.S. 1, 7-8 (1982). In that case the Supreme Court said:

> Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment, see United States v. Lovasco, 431 U.S. 783, 788-789 (1977), or to a claim under any applicable statutes of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending.

456 U.S. at 7.

In any event, the magistrate determined that the petitioner's claim should be resolved as a due process claim and not one under the Speedy Trial Clause of the Sixth Amendment, and the petitioner has not taken exception to this procedure.

The delay was prejudicial to petitioner's trial, "in violation of the Sixth and Fourteenth Constitution [sic]."[2] In this statement the petitioner correctly recognized that delay in prosecution **absent actual prejudice**, does not present a due process violation. *Stoner v. Graddick*, 751 F.2d 1535, 1544 (11th Cir. 1985) ("if no substantial prejudice is proved, then the guidepost for judging impermissible delay is the Alabama statute of limitation, which would, in this case, allow for delay in excess of 19 years"). It is only "proof of actual prejudice [which] makes a due process claim [for delay in prosecution] concrete and ripe for adjudication." *United States v. Lovasco*, 431 U.S. 783, 790 (1977). However while, as stated, actual prejudice is "necessary in order to render the claim justiciable, it does not make the claim "automatically valid," *United States v. Lovasco, supra*, at 789, since, according to the majority view, for instance, there must be in addition to actual prejudice proof that the delay was "a deliberate device to gain an advantage over [the defendant]." *United States v. Gouveia*, 467 U.S. 180, 192 (1984).

Moreover, the requirement of actual prejudice is a "fairly stringent" standard, *Stoner v. Graddick, supra*, at 1544; *United States v. Castellano*, 610 F. Supp. 1359, 1385 (S.D.N.Y. 1985), one under which "a defendant bears a heavy burden" of proof. *United States v. Marler*, 756 F.2d 206, 213 (1st Cir. 1985); *see also* 28 U.S.C. § 2254(d). It means specifically "actual," not "speculative or premature" prejudice. *United States v. Marion*, 404 U.S. 307, 326 (1971). The Supreme Court has not, though, sought to identify "in the abstract" the circumstances which will constitute in this context "actual prejudice; . . . [i]ndeed, in the intervening years [between *Marion and Lovasco*] so few defendants have established that they were prejudiced by delay that neither this court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay." *United States v. Lovasco, supra*, at 796-97.

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2 He submitted with his petition a supporting memorandum of law, which said that a federal court was "bound by [the] presumption of correctness standard enunciated in *Sumner v. Mata*, 449 U.S. 539 (1981), and under 28 U.S.C. Section 2254(d)(8) to overturn a State Court finding of fact when the finding is not **fairly supported in the record**" (emphasis in original).

The Supreme Court has, therefore, left to the lower courts the development of the circumstances when "actual prejudice" will arise in a case of delay in prosecution.

When the claim of delay relates to the unavailability of a substantial witness at trial, though, the courts have uniformly established the standard to be applied in assessing actual prejudice in such a case. Under this standard, the defendant, in order to establish actual prejudice, is required (1) to identify the lost witness; (2) to demonstrate the content or substance of the witness' testimony; and (3) to show what efforts were made to locate the witness. *State v. Brown*, 742 F.2d 359, 362 (7th Cir. 1984); *United States v. Kidd*, 734 F.2d 409, 413 (5th Cir. 1984); *United States v. Mills*, 641 F.2d 785, 788 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981); *United States v. Tousant*, 629 F.2d 810, 814 (9th Cir. 1980). Both the state courts and the magistrate (whose decision was adopted by the district court) accepted this standard for determining actual prejudice in this case. I therefore take it to be the controlling standard in assessing actual prejudice here.

There was no dispute that the petitioner had met the first and second requirements of the test for establishing actual prejudice in the case of an unavailable witness in a criminal trial; the controversy in this case focuses on the magistrate's findings relating to the third requirement. The parties agree that under this requirement the petitioner had the burden of establishing "that petitioner [Howell] did make a reasonable and diligent effort to locate Hunt prior to his trial." The magistrate would find that the petitioner had met this standard. He did so on the state record alone; he held no independent evidentiary hearing. The state courts, on the other hand, found on the same record that the petitioner "ha[d] not established that with due diligence he attempted to locate Mr. Hunt, and the Court finds that with due diligence Mr. Hunt could probably have been located in the State of Florida." Thus we have two conflicting findings on a critical issue, dispositive of petitioner's due process claim, one made *de novo* by the magistrate on the state court record and the other by the state courts on two evidentiary hearings in said state courts.

The magistrate held, as we have indicated, no independent evidentiary hearing, but he accepted the state record as the basis for his findings. This record consists of two proceedings, in connection with which the state courts held separate evidentiary hearings and made like findings. We review briefly these two proceedings. At the first state proceedings held at the time of trial, the petitioner sought dismissal of the proceeding because of "the delay between the issuance of the arrest warrant on November 1, 1979, and the service of the warrant on the defendant [petitioner] on February 4, 1982." The court held an evidentiary hearing in the matter. At that hearing, the petitioner contended that he was working for Roy Hunt at the time he was alleged to have robbed the victim but that Hunt was unavailable to testify. It was said Hunt had moved from Lumberton and was unavailable as an alibi witness for petitioner. However, the state court at that time found from the evidence that "a sister of said Roy Hunt currently lives in Lumberton, N.C." The petitioner offered testimony that Hunt had closed his body shop and had left Lumberton and that he did not know where he was at the time of the trial. The state raised the point that neither the petitioner nor anyone on his behalf attempted to secure Hunt's address from the sister. This was the critical fact in the state court's decision, both in this and in the later proceedings. As we see later, the United States Magistrate dismissed out of hand this contention, stating bluntly that "there was no evidence that petitioner or his brother knew of Hunt's sister." However, petitioner himself, in his direct testimony in the suppression hearing, testified as follows:

Q. And is Mr. Hunt still in the body shop business over there in Lumberton?

A. No, sir.

Q. Where is Mr. Hunt at this time?

A. I don't know really. All I -- I talked to his sister a while back, and she said he was in Florida.

The petitioner, so far as the record shows, made no inquiry of the sister where Hunt was in Florida. Presumably, if the sister knew her brother was in Florida, she knew his whereabouts in Florida. It would certainly have been natural to inquire of the sister Hunt's location in Florida. Petitioner seemed to have assumed that the fact that Hunt was in another state was sufficient for his motion to suppress and made no further inquiry of Hunt's sister. The court denied the motion to dismiss with a written opinion, holding that the petitioner had "offered no evidence of any efforts which he has made to locate Roy Hunt," and thus had not established either actual prejudice or that the government had any connection with Hunt's absence "in order to gain tactical advantage over the defendant such as to violate due process."

The matter thereafter went to trial and the petitioner was convicted. He appealed his conviction to the North Carolina Court of Appeals, claiming error in the denial of his motion to dismiss because of the unavailability of the witness Hunt. The Court of Appeals affirmed the conviction, holding that the "Defendant has failed to show any tactical disadvantage because he could not locate Roy Hunt, an alibi witness, what he did to locate him, or that he is lost due to the pre-indictment delay; or that the defendant [sic] would have significantly aided his defense. Defendant at most has demonstrated only potential prejudice, not actual prejudice."

The petitioner later filed for post-conviction relief in the state court. This was a second time to present to the state court the issue that is the heart of this appeal. The petitioner had in his petition for relief included certain parts of the transcript of the hearing on the pre-trial motion of the petitioner. The petitioner also testified at the evidentiary hearing on this motion for post-conviction relief. He testified to no inquiries made by him of the whereabouts of Hunt in Florida in his talk before trial with Hunt's sister. An affidavit of Charlie Matamoros was introduced at the hearing. Matamoros said that the petitioner's brother Stacy inquired of him where he could reach Hunt, and he told him he knew only "that Roy had moved to Florida." The petitioner offered no other proof of any effort on his part or on his behalf to locate where Hunt lived in Florida. The state court dismissed the petition, making these written findings, among others: that "his

brother looked for Hunt, but could not find Mr. Hunt, that Mr. Hunt had moved to Florida," that Hunt had six sisters, one of whom was living in Lumberton in 1982, and that "there is no evidence that Mr. Howell [the petitioner] or anyone acting on his behalf attempted to locate Mr. Hunt's sisters or mother to determine the location of Mr. Hunt in Florida." It concluded with this finding: "That Mr. Howell has not established that with due diligence he attempted to locate Mr. Hunt, and the Court finds that with due diligence Mr. Hunt could probably have been located in the State of Florida." The state court accordingly dismissed the post-conviction petition.

This federal habeas action followed. The proceedings were assigned to the magistrate, who held, as we have said, no evidentiary hearing but rendered his findings of fact on the basis of the state record. He found on the state record that the petitioner had made "a reasonable and diligent effort to locate Hunt prior to his trial." He recognized that this was an essential fact on which the petitioner had the burden of proof. He excused this failure of the petitioner to seek information from Hunt's sister or mother by finding that petitioner did not know the sister. The district court adopted as its opinion the findings and conclusions of the magistrate.

The findings made by the federal magistrate were not based on an evidentiary hearing held by him but solely on the state record of petitioner's petition to suppress and of his post conviction petition. It was a review without any deference to the prior state findings on the due process claim. The two successive state courts' findings, on the other hand, were made on the basis of a plenary hearing in each case by the judge who filed written findings in support of his decision, and who had the benefit of hearing and seeing in person the witnesses. More importantly, the findings and conclusions of the magistrate do not purport to comply with the Congressional mandate of 28 U.S.C. § 2254(d) or with the decisions prescribing the application of such section as illustrated by the decision in *Sumner v. Mata*, 449 U.S. 539 (1981), which directs federal courts to accord deference to the findings of the state court in such cases as this and, if he differs, to state his reasons for such difference; in fact, it is completely silent on both the statute and the Supreme Court's decisions on

the application of the statute. That was plain error that demands reversal, unless we are to assume that § 2254(d) and *Sumner v. Mata* have no relevancy. I now address this error.

Title 28 U.S.C. §§ 2254(d) and (e) provide that in any federal habeas petition by a person such as Howell, who was incarcerated pursuant to a judgment of a state court, "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish [one of the some eight exceptions that apply]," the last of which is (8):

> unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

Subsection (d) continues with the statement that if exception (8) is raised, "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

Sumner v. Mata, 449 U.S. 539 (1981), sets forth the standards to be followed in applying § 2254(d). As was the situation here, the petitioner in *Sumner* was in state custody under a state judgment of conviction of murder. The state offered three witnesses who identified the defendant as a participant in the murder. The defendant in turn offered three witnesses who said they saw the defendant in bed at the time of the fatal stabbing. He made no objection to this identification testimony at trial but on appeal he did object. He asserted the pre-trial photographic identification as conducted by the state police violated due process. In disposing of that claim, the California Court of Appeals said

that the case was to be decided on its facts. It then reviewed the facts and concluded that the circumstances of the identification "indicate[d] the inherent fairness of the procedure" and found "no error in the admission of the identification testimony." No attempt was made to secure review of the decision by the state supreme court. The defendant did raise it again in his state post-conviction proceeding but again the claim was dismissed. Federal habeas was then filed in the district court, which denied the petition. On appeal the court of appeals reversed. The appellate court reviewed the case on the same record, which consisted of the state court trial record, just as the magistrate did in this case. Its findings were "considerably at odds with the findings made by the California Court of Appeals," again just as the magistrate did in this case. It accordingly granted the petition. On certiorari the Supreme Court reversed.

The Supreme Court, in its opinion reversing the grant of the writ, began by declaring "[s]ection 2254(d) applies to cases in which a state court of competent jurisdiction has made 'a determination after a hearing on the merits of a factual issue.'" 449 U.S. at 546. The policy basis for such statute is stated to be "federalism" and

> [t]his interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts. This is true particularly in a case such as this where a federal court makes its determination based on the identical record that was considered by the state appellate court and where there was no reason for the state trial court to consider the issue because respondent failed to raise the issue at that level.

449 U.S. at 547. The Court continued that in adding (d) to § 2254 in 1966,

> Congress . . . intended not only to minimize that inevitable friction [between] state and federal courts but also to establish that the findings made by the state court system "shall be presumed to be correct," unless one of the seven conditions specifically set forth in § 2254(d) [is] found to exist by the federal habeas court. If none of those conditions [is] found to exist, or unless the **habeas** court concludes that the relevant state-court determination is not "fairly supported by the record," "the burden shall rest upon the applicant to establish **by convincing evidence** that the factual determination by the State court was erroneous."

449 U.S. at 550 (emphasis in original). This requirement of "convincing evidence" was intended to underscore Congress' intention that the state-court determination was not to be overturned "on the basis of the usual 'preponderance of the evidence' standard" and "[i]n order to ensure that this mandate of Congress is enforced" in that regard, the Supreme Court added that "'**we now hold that a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present or the reasoning which led it to conclude that the state finding was "not fairly supported by the record.**'" 449 U.S. at 551 (emphasis added). The Court then found that the court of appeals had failed to observe the mandate of § 2254(d) and accordingly vacated the grant of the writ in that case.

The Supreme Court has repeatedly reaffirmed the rulings in *Sumner* in later cases. *Sumner v. Mata*, 455 U.S. 591 (1982) (*Sumner II*) (repeating its disapproval of the decision of the Court of Appeals); *Marshall v. Lonberger*, 459 U.S. 422 (1983); *Maggio v. Fulford*, 462 U.S. 111 (1983); *Rushen v. Spain*, 464 U.S. 114 (1983) *Patton v. Yount*, 467 U.S. 1025 (1984); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Cabana v. Bullock*, 474 U.S. 376 (1986). *See also* 17A Wright, Miller & Cooper, *Federal Practice and Procedure Juris-*

diction 2d § 4265.1, at 403-32 (2d ed. 1988). Moreover, in *Hunt v. Woodson*, 800 F.2d 416, 418-21 (4th Cir. 1986), we reversed a grant of habeas relief in similar circumstances" to those here, after reviewing *Sumner* and its line of cases. In so doing, we said:

> In a recent line of cases beginning with *Sumner v. Mata*, 449 U.S. 539 (1981), and continuing most recently with *Kuhlmann v. Wilson*, [477 U.S. 436] (1986), the Supreme Court has clarified the meaning of § 2254(d) and in the process has reversed seven grants of the writ of habeas corpus where federal courts failed to give proper deference to state court findings of fact.

800 F.2d at 418 (citations omitted).

The case under review is singularly like *Sumner* in many important features. The state court findings and the magistrate's findings in both cases were based solely on the evidentiary record in the state court hearings. Moreover, one of the primary facts on which the magistrate based his finding was factually in error. The magistrate excused the appellee's failure to inquire of Hunt's sister the latter's Florida address by stating that the petitioner did not know the sister. In fact, this erroneous finding was the reason the magistrate reached his contrary conclusion. However, as we have said, petitioner himself testified that he knew the sister, had talked to her before trial, and was told by her that Hunt was in Florida. This error of fact which involves significantly, if not conclusively, the question of whether the petitioner had sought with diligence to locate Hunt was so obvious and so important that the decision below could well be reversed on that ground alone. Beyond this, and even more important precedentially, the magistrate in his decision did not ever take note either of Section § 2254(d) or, for that matter, of the state court's findings. So far as his decision was concerned, that statute need never have existed, and *Sumner v. Mata* and its subsequent concurring precedents had no relevance to a case such as this, thus requiring no consideration of those decisions. The magistrate chose to make his own independent findings without giving any deference to the contrary findings of the state court. He identified no one of the eight conditions set forth in Section 2254(d) which, "satisfactori-

ly supported by the record," would support his disregard of the state court findings or "establish by **convincing evidence** that the actual determination by the State was erroneous," except the incorrect statement that the petitioner did not know Hunt's sister. It follows that, in this case, where the recommendations of the magistrate, adopted by the district court, took no note of and made no attempt to comply with Section 2254(d) or of *Sumner v. Mata*, gave no deference whatsoever to the findings of fact by the state court, and reliance on an incorrect statement of fact, the grant of the writ by the district court was clear error and I submit, it cannot stand.

The majority opinion herein, however, would avoid discussing *Sumner v. Mata* or its principle by declaring that the state had in the hearing before it made "both [an] affirmative and tacit concession" that the petitioner had met the standard of having made a reasonably diligent effort to locate Hunt, the missing witness. It arrived at its assumption that the state had abandoned a defense of actual prejudice on a review of the tape of the oral argument and "colloquies" between the court and state's counsel at oral argument. It extracts from neither of these sources, so far as I can see, an "affirmative" concession of actual prejudice. To have done so would be to repudiate the basis on which the state courts had dismissed the petitioner's claim. Had the state intended to concede actual prejudice, it would have made unnecessary and inappropriate for it to have included the findings of the state court on this issue in its brief. Certainly, neither the federal magistrate nor the district court which adopted the magistrate's opinion (except for the retrial issue) would have had to address the issue of actual prejudice. The majority, however, would premise that the state had indicated in its brief and oral argument an abandonment of the prejudice issue and had consciously chosen to limit its argument to the contention that under *United States v. Gouveia*, 467 U.S. 180, 192 (1984), delay in prosecution is only violative if the delay was both prejudicial and intentional in order to "impair defendant's ability to defend himself or to gain a tactical advantage." We do not read into the record before this court an abandonment on the part of the state of the defense of want of actual prejudice in this type of case. Moreover, the record is before us and we should render justice on the basis of the record and not on "colloquies" between the court and coun-

sel. The record is clear on the absence of that actual prejudice which is an essential element of the petitioner's proof here, and it is equally clear that the magistrate did not conform his findings to the standard as established by Section 2254(d) and *Sumner v. Mata*. It would be a travesty for the court to refuse to consider the issue on which the decision below was based with the phrase that "the issue of actual prejudice need not be addressed." I submit we as a court of justice are not to blind ourselves to the clear error in the decision below, whether the parties have argued the point or not. Fortunately, the rule does not compel us to close our eyes to such error. The Supreme Court in *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), made this clear:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

In *Washington Gas Light Co. v. Virginia Electric & Power, Co.*, 438 F.2d 248, 250-51 (4th Cir. 1971), it was urged in an anti-trust case that since the rule in *Parker v. Brown*, 317 U.S. 341 (1943), had not been considered by the district court or argued in the court of appeals, the court need not address that point. Relying on *Hormel v. Helvering*, we dismissed the argument, saying

> We think the rigid application of such a rule of procedure is inappropriate where the record provides an adequate basis for consideration on the merits.

Again, in *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256 n. 2 (4th Cir. 1987), we, quoting from *Walker Mfg. Co. v. Dickerson, Inc.*, 560 F.2d 1184, 1187 n. 2 (4th Cir. 1977), said:

> We think the rigid application of such a rule of procedure is inappropriate where the record provides an adequate basis for consideration on the merits.

Again, in *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256 n. 2 (4th Cir. 1987), we, quoting from *Walker Mfg. Co. v. Dickerson, Inc.*, 560 F.2d 1184, 1187 n. 2 (4th Cir. 1977), said:

> Although this point was not presented to the district court or raised by the parties on appeal, that does not preclude the Court from considering it *sua sponte*, in order to "reach the correct result."

This is precisely such a case as requires our consideration of a ground for reversal of the judgment below, whether that ground was argued either in the briefs filed with us or during oral argument.

I would reverse the decision below and remand the case to the district court with instructions to dismiss the petition on the ground assigned by the state court. This action would make it unnecessary to consider the other ground for reversal. I, however, agree that reversal is required on that ground, too. I state briefly my reasons for this view.

I proceed now to the state's second contention. The state contends that not only must the delay in prosecution be prejudicial, but, in addition, it must have been intentional in order "to impair defendant's ability to defend himself or to gain a tactical advantage," *United States v. Marion*, 404 U.S. 307, 325 (1971), or was made in "reckless disregard of circumstances . . . suggesting there existed an appreciable risk that the delay would impair the ability to mount an effective defense," *United States v. Lovasco*, 431 U.S. at 795 n. 17. This is the rule which was stated in *United States v. Gouveia*, 467 U.S. at 192, on the basis of the review of *Marion* and *Lovasco*, and is the rule on which the state also, along with the absence of actual prejudice, requires reversal in this case.[3] There is no question that this rule relied on by the state is in line with the rule in the First Circuit, *United States v. Lebron-Gonzalez*, 816 F.2d 823, 831 (1st Cir.), *cert. denied*, 484 U.S. 843 (1987); in the Second Circuit, *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), *cert. denied*, 484 U.S. 843 (1988); in the Third Circuit, *United States v. Ismaili*, 828 F.2d 153, 166-68 (3d Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); in the Sixth Circuit, *United States v. Atisha*, 804 F.2d 920, 928-29 (6th

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3 In *Gouveia*, the Supreme Court said:

> Thus, at bottom, the majority's concern is that because an inmate suspected of a crime is already in prison, the prosecution may have little incentive promptly to bring formal charges against him, and that the resulting preindictment delay may be particularly prejudicial to the inmate, given the problems inherent in investigating prison crimes, such as the transient nature of the prison population and the general reluctance of inmates to cooperate. But applicable statutes of limitations protect against any defendant, bringing stale criminal charges against any defendant, *United States v. Lovasco, supra*, 788-789; *United States v. Marion, supra*, at 322, and, beyond that protection, the Fifth Amendment requires the dismissal of an indictment, even if it is brought with the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense. *United States v. Lovasco, supra*, at 789-790; *United States v. Marion, supra*, at 324.
>
> 467 U.S. at 192

Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987); in the Eighth Circuit, *United States v. Bliss*, 735 F.2d 294, 300 (8th Cir. 1984); in the Tenth Circuit, *United States v. Jones*, 816 F.2d 1483 n. 2 (10th Cir. 1987), *Perez v. Sullivan*, 793 F.2d 249, 259 (10th Cir.), *cert. denied*, 479 U.S. 936 (1986), and *United States v. Jenkins*, 701 F.2d 850, 854 (10th Cir. 1983), and in the Eleventh Circuit, *United States v. Benson*, 846 F.2d 1338, 1342-43 (11th Cir. 1988), *United States v. Corporale*, 806 F.2d 1487, 1514 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987). While there has been some waffling in the decisions of the Seventh Circuit on this issue, *see United States v. Perry*, 815 F.2d 1100, 1104 (7th Cir. 1987), that circuit, in two later cases in which the court relied on *Gouveia*, has come down firmly in accord with the majority-rule. *United States v. Fuesting*, 845 F.2d 664, 669 (7th Cir. 1988); *United States v. Antonino*, 830 F.2d 798, 804 (7th Cir. 1987). The Fifth Circuit seems to continue to be inconclusive on the issue, *Dickerson v. Louisiana*, 816 F.2d 220, 229 n. 16 (5th Cir.), *cert. denied*, 484 U.S. 956 (1987); *but see United States v. Carlock*, 806 F.2d 535, 549 (5th Cir. 1986), *cert. denied*, 480 U.S. 949 (1987). Only two circuits are said to have concluded that prosecutorial misconduct is "not the *sine qua non* for a due process violation from prosecutorial indictment delay." *See* Justice White's dissent from denial of grant of certiorari in *Hoo v. United States*, 484 U.S. 1035 (1988). These circuits are the Fourth and Ninth, in *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403-04 (4th Cir. 1985), and *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986). It is significant that *Automated Medical*, decided shortly after *Gouveia*, did not cite or discuss that decision, which was contrary to the ruling in *Automated Medical*. I do not think that a decision decided adversely to a Supreme Court decision should be given any weight by us. I think we should follow *Gouveia* and the majority of the cases which do follow *Gouveia*. In any event, I am of the opinion that *Gouveia* should be our guide. If it is, *Gouveia* gives a second reason for reversing the decision below.

I would reverse the decision of the magistrate, adopted by the district court, on both grounds.

NORTH CAROLINA
BLADEN COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
82 CR 783
Filed: June 21, 1982

STATE OF NORTH CAROLINA)
)
v.) **ORDER DENYING**
) **MOTION TO DISMISS**
WILTON HOWELL)

THIS CAUSE coming on to be heard and being heard before the Honorable Edwin S. Preston, Jr., Judge Presiding at the May 10, 1982 Session of Superior Court; and the Court having heard all of the evidence, makes the following findings of fact:

1. That the defendant was personally present in open Court with his counsel, Jack E. Carter;

2. That this evidentiary hearing was held in the absence of the jury;

3. That the Court had an opportunity to see and observe each witness and determine what weight and credibility to give each witness' testimony;

4. That on or about September 19, 1979, in Bladen County, North Carolina, the prosecuting witness, Ruby Carlyle, was allegedly robbed by two black men who utilized dangerous weapons in the course of said robbery;

5. That on or about October 31, 1979, Ruby Carlyle viewed a police line-up at the Robeson County, North Carolina jail, in which the defendant appeared and at which the defendant's counsel, Jack E. Carter, was present; that during said line-up, Ruby Carlyle identified the defendant as one of the men who robbed her on September 19, 1979;

6. That pursuant to the request of Deputy Sheriff Phillip Little, a Magistrate of the District Court of Bladen County issued a warrant for the defendant's arrest, charging the defendant with armed robbery in violation of G.S. 14-87;

7. That defendant was incarcerated in the Robeson County Jail on or about November 1, 1979;

8. That during November, 1979, Deputy Sheriff Little requested the Robeson County Sheriff's Department to notify him upon disposition of the charges pending against the defendant in Robeson County;

9. That defendant remained incarcerated in the Robeson County Jail until February, 1980, at which time he was released; That during the months of November, 1979, December, 1979, January, 1980, and February, 1980, Deputy Sheriff Little received no information from the Robeson County Sheriff's Department.

10. That during the months between February, 1980 and February, 1982, Deputy Sheriff Little sent several inquiries to the Robeson County Sheriff's Department in an effort to locate the defendant, and was unable to do so;

11. That on or about February 4, 1982, Deputy Sheriff Little received a communication from the Robeson County Sheriff's Department; As a result of said communication, he served said warrant for arrest on the defendant;

12. That on or about September 19, 1979, the defendant was employed by the City of Lumberton and Hunt's Body Shop in Lumberton, North Carolina;

13. That the defendant contends that he was working with Roy Hunt at the time of said robbery alleged to have occurred on September 19, 1979; and defendant contends that Roy Hunt is unavailable to testify for the defendant; that defendant has offered no evidence of any efforts which he has made to locate Roy Hunt;

14. That the sister of said Roy Hunt currently lives in Lumberton, N.C.

Upon the foregoing findings of fact, the Court concludes as a matter of law that the delay between the issuance of the arrest warrant on November 1, 1979 and the service of the warrant on the defendant

on February 4, 1982 was not prejudicial to the defendant in the conduct of his defense; nor was said delay unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant such as to violate due process.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the defendant's motion to dismiss should be and the same is hereby denied.

This the 12 day of May, 1982.

/s/_____
Edwin S. Preston, Judge Presiding

NORTH CAROLINA

COUNTY OF BLADEN

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FEB. 18, 1985, CRIMINAL SESSION

FILE 82-CRS-783

WILTON HOWELL
PETITIONER

-V-

STATE OF NORTH CAROLINA
RESPONDENT

ORDER

A plenary hearing was held on the 18th day of February, 1985. The petitioner was present and was represented by his attorney, Mr. Jack E. Carter. The State was represented by Mr. Thomas S. Hicks. The proceeding was initiated by the filing of a motion for appropriate relief on October 11, 1984. That the trial complained of was held in the Superior Court of Bladen County, in which judgment was entered on October 12, 1982. The petitioner convicted [sic] of the offense of robbery with a dangerous weapon and was sentenced to not less than nine years and no more than forty years in the custody of the North Carolina Department of Correction.

The Court finds the petitioner alleges and contends that his rights were violated in that under the provisions of North Carolina General Statute 15A-1415(b)(6) evidence is now available to the petitioner which establishes his alibi and presence at Ray Hunt's Body Shop during those times when the victim of the offense testified the perpetrators of the armed robbery were present on her premises.

The Court heard the evidence of the petitioner, the arguments of the attorneys, the evidence of the State, and the arguments of the District Attorney, and each side stated that there was no other evidence to be presented.

From a consideration of all the competent evidence offered and after considering the arguments of counsel, the court finds these facts:

(1) That on March 22, 1982, the defendant filed a motion to dismiss the charge; and after a hearing, Judge Edwin S. Preston entered an order denying the motion to dismiss.

In that order Judge Preston found in paragraph 12, "That on or about September 19, 1979, the defendant was employed by the City of Lumberton and Hunt's Body Shop in Lumberton, North Carolina." And in paragraph 13, "That the defendant contends that he was working with Roy [sic] Hunt at the time of said robbery alleged to have occurred on September 19, 1979, and the defendant contends that Roy [sic] Hunt is unavailable to testify for the defendant; that the defendant has offered no evidence of any efforts which he has made to locate Roy [sic] Hunt."

(2) That the matter was tried, and a verdict of guilty of robbery with a dangerous weapon was entered by the jury on October 12, 1982. The petitioner appealed his case to the North Carolina Court of Appeals. In a case filed on April 17, 1984, the Court of Appeals affirmed the judgment of the Superior Court.

And in said opinion of the Court of Appeals, the Court of Appeals stated, "Alibi Witness. Defendant has failed to show any tactical disadvantage because he could not locate Roy [sic] Hunt, an alibi witness; what he did to locate him, or that he is lost due to the preindictment delay; or that the witness would have significantly aided his defense. Defendant at most has demonstrated only potential prejudice, not actual prejudice. Therefore, his argument must fail."

(3) That at the plenary hearing on February 18, 1985, the petitioner, Wilton Howell, testified that he asked in 1982 after the warrant was served on him in February, of 1982, to have Mr. Hunt located; and that his brother looked for Mr. Hunt, but could not find Mr. Hunt; that Mr. Hunt had moved to Florida.

(4) That Stacy Howell, brother of petitioner, testified that he and Mr. Jack E. Carter tried to locate Ray Hunt after his brother was arrested in 1982; and that Stacy Howell talked with Charlie Matamoros, a relative of Mr. Hunt; that Mr. Hunt was supposed to have moved to Florida and he did not know where.

(5) That George Ray Hunt testified that in September, of 1979, he was operating Ray's Body Shop on West Fifth Street in Lumberton, North Carolina; that he knew the petitioner; that the petitioner was

working with him at that time; that on September 19, 1979, the petitioner was working for him and came to work early that day from his job with the City of Lumberton; that George Ray Hunt paid Wilton Howell for his work that week in an amount larger than he usually paid him; that the petitioner was at work that day until 5:00- or 6:00 p.m.; and that Mr. Howell did not leave the body shop that day.

(6) That Mr. Hunt testified that he has six sisters; that none of them live in Lumberton, but one did live in Lumberton in 1982; and that the sister should have known what his address was in Florida.

(7) That Mr. Hunt is now residing in Robeson County. That there is no evidence that Mr. Howell or anyone acting in his behalf attempted to locate Mr. Hunt's sisters or mother to determine the location of Mr. Hunt in the State of Florida.

(8) That the name of Mr. Hunt was given to Mr. Phillip Little of the Bladen County Sheriff's Department; and that Mr. Little asked the Robeson County Sheriff's Department to try to locate him, but received no answer back.

(10) That the testimony of Mr. Hunt would tend to corroborate the testimony of Wilton Howell as to his employment on the date of the alleged robbery, but that it does not amount to new evidence or additional evidence.

(11) That Mr. Howell has not established that with due diligence he attempted to locate Mr. Hunt, and the Court finds that with due diligence Mr. Hunt could probably have been located in the State of Florida.

From the foregoing, the Court concludes as a matter of law:

(1) That the petitioner has not established that evidence is available which was unknown or unavailable to the petitioner at the time of the trial which could not with due diligence have been discovered or made available at that time which has a direct and material bearing upon the guilt or innocence of the petitioner.

(2) That the petitioner had a fair and impartial trial, and none of his constitutional or other legal rights were denied or violated in any respect during the trial.

(3) That the petition of the petitioner for a new trial should be denied.

It is, therefore, ORDERED that the motion of the petitioner for a new trial is hereby denied and dismissed.

This the 20th day of February, 1985.

/s/_____
B. CRAIG ELLIS, JUDGE PRESIDING

To the signing and entry of the foregoing order, the petitioner objects and excepts and gives notice of appeal to the North Carolina Court of Appeals.

This the 20th day of February, 1985.

/s/_____
B. CRAIG ELLIS, JUDGE PRESIDING

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

WILTON HOWELL, Petitioner,	)	NO. 86-1072-HC
v.	)	MEMORANDUM AND RECOMMENDATION
W. R. BARKER, ET AL, Respondents.	)	

This case is now before the court on the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. §2254 by the petitioner, a North Carolina prisoner. Respondents have filed an answer and have moved to have the petition dismissed. On December 29, 1986 petitioner acting *pro se* filed a memorandum of law in opposition to the respondents' motion to dismiss and on January 11, 1988 he filed a supplemental memorandum of law through his attorney, Gordon Widenhouse.1

Respondents made no filing in response to petitioner's supplemental filing and this matter is now ripe for ruling by this court. On October 12, 1982 in the Superior Court of Bladen County, Honorable Donald L. Smith, Judge Presiding, Petitioner was convicted of armed robbery following a trial by jury. Petitioner was then sentenced to a prison term of not less than nine nor more than forty years. Petitioner appealed his conviction to the North Carolina Court of Appeals which affirmed in an opinion filed April 17, 1984 and reported at 67 N.C.App. 763. On October 11, 1984, Petitioner filed a motion for appropriate relief in the Superior Court of Bladen County which was denied by the

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1 On December 10, 1987, the court filed an order requiring the supplemental memorandum of law to be filed by January 8, 1988. Petitioner's January 11, 1988 filing will be accepted because the court was closed on Friday, January 8th due to snow accumulation and inclement weather.

Honorable B. Craig Ellis on February 20, 1985. Throughout the above mentioned proceedings, Petitioner was represented by Jack E. Carter of the Cumberland County Bar. However, Petitioner acting *pro se* sought appellate review of the denial of his motion for appropriate relief but certiorari was denied on December 19, 1985. Petitioner's January 6, 1986 *pro se* application for appropriate relief was denied on March 6, 1986 and Petitioner did not seek certiorari to review that denial.

On May 15, 1986, Petitioner sought a writ of habeas corpus from this court, but Petitioner's application was dismissed for non-exhaustion of state remedies on September 9, 1986 by the Honorable James C. Fox.

In the present petition, Petitioner contends that his constitutional rights have been violated because (1) he was denied a speedy trial, (2) he was not served with the arrest warrant until twenty-seven months after the warrant's issuance, (3) his due process rights were violated by the mishandling of the testimony of a state witness, and (4) his motion to suppress the prosecuting witness' identification of him was denied. The respondents inform the court that Petitioner has now exhausted as to all of his contentions presently before the court.

The question presented to the court by Petitioner is whether or not the time lapse between the issuance of the warrant for his arrest and the serving of that warrant violated either his constitutional right to due process or his constitutional right to a speedy trial where the prosecution (1) had completed its investigation of the alleged crime on the date of the issuance of the arrest warrant, (2) had known Petitioner was incarcerated in the jail of a neighboring county for approximately five months after the issuance of the arrest warrant and (3) should have known that Petitioner remained in the custody of the North Carolina Department of Correction for about another thirteen months after leaving the county jail.

The relevant facts are as summarized herein. In Bladen County on September 19, 1979, shortly after 2:30 p.m., Ruby Carlyle was robbed by two men in her grocery store at gun and knife point of the sum of One Thousand Dollars ($1,000.00). On October 31, 1979, Petitioner was being held on unrelated charges as a prisoner in the Robeson County jail and was visited and interrogated by Detective Phillip Little of the Bladen County Sheriff's Department. Later that night at the Robeson County jail Petitioner appeared before Ms. Carlyle in a police line-up. Ms. Carlyle then identified the Petitioner as a man who looked like one of the men who robbed her store. The next day, November 1, 1979, Detective Little sought a warrant for Petitioner's arrest

which was issued by a county magistrate on the same day. Though Detective Little knew Petitioner was confined to the Robeson County jail, he neither served the warrant on Petitioner nor delivered it to Robeson County officials for them to serve. Likewise, with regard to the arrest warrant issued from Bladen County, no detainer against Petitioner was filed with the Robeson officials.

Petitioner remained in the Robeson County jail until sometime near the end of March 1980. Upon being released from the Robeson County jail, Petitioner was placed in the custody of the North Carolina Department of Correction and was paroled in April 1981. During Petitioner's period of incarceration, from the November 1, 1979 issuance of the warrant for his arrest until his parole in April 1981, Petitioner was not served with the Bladen warrant for his arrest and the record does not show that he ever knew of the warrant until it was actually served on February 4, 1982. In sum, Petitioner was not served with the arrest warrant until some twenty-seven months after the warrant had been issued in spite of the fact that the respondents knew his exact whereabouts until the end of March 1980 and should have known of his whereabouts until his release from state custody in April 1981. At no time during the twenty seven months in which the arrest warrant remained unserved did Petitioner try to avoid or escape respondents.

Petitioner claims that he was denied his rights to due process of law and a fair trial because of respondents' twenty-seven months [sic] delay in serving him with the warrant for his arrest. Petitioner complained that he was prejudiced by the pre-trial delay because his alibi witness and former employer, George Ray Hunt, had moved to Florida in the early part of 1980 and could not be located in time to testify at Petitioner's trial which was held on October 12, 1982. Petitioner's brother, Stacy Howell, at the request of Petitioner's attorney, had tried to determine Hunt's Florida location. Howell asked Hunt's brother-in-law, Charlie Matamoros of Lumberton, about Hunt's whereabouts. Matamoros only knew that Ray Hunt was in Florida and he indicated to Petitioner's brother that he would inform him of Hunt's whereabouts if he could locate him. Stacy Howell did not know Hunt's mother and did not ask her for Hunt's Florida address.

Presumably, if respondents had promptly served the arrest warrant upon Petitioner or had filed a detainer against Petitioner with the Robeson authorities, then Petitioner would have demanded to be tried. N.C.Gen.Stat. §15-10.2 requires a person in state custody who has a detainer lodged against him to be tried within eight months of his request to be tried. Prompt action also would have given Petitioner notice of the charges against him and would have allowed him to contact (and

remain in contact with) his alibi witness who moved from Lumberton, North Carolina no less than if not more than three months after the warrant for Petitioner's arrest had been issued.

The right to a speedy trial, guaranteed under the protections of the Sixth Amendment, is extended only to a putative defendant who has **in some way** become an accused. *United States v. Marion*, 404 U.S. 307, 313 (1971). "In all criminal prosecutions, the **accused** shall enjoy the right to a speedy and public trial. U.S. Const. amend. VI. (Emphasis supplied). In the case at bar, the Sixth Amendment Speedy Trial provision is inapplicable to Petitioner's situation **unless** the issuance of an arrest warrant bestows upon the subject of such a warrant the status of "accused."

The Supreme Court discussed the meaning of the term "accused" in connection with the triggering of Sixth Amendment protections in *Marion*. The *Marion* court examined a three-year delay between the commission of an offense and the pre-arrest indictment to determine if such a delay violated the defendants' right to a speedy trial. The Court said that the protections of the Sixth Amendment are "activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." *Marion* at 313. On the facts of *Marion*, the Court held that the defendants had not become accused until they had been indicted. The indictment had been the initial document of record that was related to the criminal prosecution of the defendants - it was the first official document which blamed, incriminated, or charged the defendants with any violation of the law.

Has a person who has not yet been indicted but who has been named in an arrest warrant, which states that there is probable cause to believe that the named person has committed specific criminal acts, been accused as that term is used and intended in the Sixth Amendment? According to N.C.Gen.Stat. §15A-304 an arrest warrant is a "statement of the crime of which the person to be arrested is **accused**, and an order directing that the person so **accused** be arrested and held to answer to the **charges made against him.**" (Emphasis supplied). Thus, on its face, an arrest warrant which preceded an indictment would appear to serve the purpose of transforming the person named in the warrant into an "accused"; thereby entitling the subject of the warrant to the right to a speedy trial.

However, various courts which have been called on to interpret *Marion* have disagreed about what the Court actually intended when it discussed the meaning of "accused" as that word is used in the Sixth

Amendment. *State v. McCoy*, 303 N.C. 1 (1981). Some federal and state courts have interpreted *Marion* to mean that the defendant becomes an accused "through arrest **or otherwise**" and that "the constitutional speedy trial clock begins to run when any formal complaint is issued against defendant notwithstanding that no indictment has been issued nor an arrest made." *Id.* 9-10. These courts no doubt based their interpretation on language in *Marion* which suggests that the speedy trial guarantee is aimed more directly at protecting persons from the consequences of public accusation than at protecting them from the actual or possible prejudice to the defense that may result from trial delay. *See Marion* at 320. *Marion* also suggests that one is an accused after he has been **charged** or indicted. *Id.* at 318.

On the other hand, some federal and state courts have held *Marion* to mean that a speedy trial is guaranteed only to those who have been arrested or indicted. While it can be said that *Marion* leaves some doubt as to whether or not an arrest warrant can be considered as the original or accusatory point in the course of a criminal prosecution, there is no escaping the express language of *Marion*: "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *Id.* at 320.

"The question, therefore, whether constitutional speedy trial standards . . . apply to any period of delay between the issuance of an arrest warrant and defendant's actual arrest when both these events precede indictment is not easily answered." *McCoy* at 10. Fortunately, the instant case can be disposed of by a due process analysis, thus eliminating the necessity of determining the proper definition of the term "accused." Oppressive pre-indictment delay can be analyzed under the Due Process Clause of the Fifth Amendment. *See Marion* at 324; *United States v. Sample*, 565 F.Supp. 1166 (E.D.Va. 1983).

In considering Petitioner's claim that he has been denied due process, the court is aware that the state of North Carolina has no statute of limitations which bars prosecution of a felony. *State v. Burnett*, 184 N.C. 783. However, "the statute of limitations does not fully define Petitioner's rights with respect to the events occurring prior to indictment." *Marion* at 324. "The interest of 'preventing' prejudice to the defense caused by passage of time . . . is protected primarily by the Due Process Clause and by statutes of limitations. . . Thus, the Fifth Amendment's due process clause is an added protection to citizens who are accused of a crime but because of governmental delay are not timely prosecuted." *Sample* at 1174.

In making out a successful Fifth Amendment due process claim, the Petitioner bears the burden of offering definite proof that the prosecutor's delay actually prejudiced his defense. *Sample* at 1175. Petitioner's proof must be more than mere speculation; he must show that his defense was impaired. *Id.* If Petitioner makes a satisfactory showing of actual prejudice, then the court must balance this prejudice against the reasons advanced by the prosecution for its delay in prosecuting. *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399 (4th Cir. 1985). The basic inquiry then becomes whether prosecuting by trial after substantial delay violates the fundamental concepts of justice or the community's sense of fair play and decency. *Id.*; *United States v. Lovasco*, 431 U.S. 783 (1977).

One of Petitioner's claims of actual prejudice is the claim that the pre-indictment delay of more than twenty eight months after the issuance of the arrest warrant caused him to lose contact with his alibi witness.2

As to a "lost" witness, specific, as opposed to general, allegations are necessary to make a showing of actual prejudice. The petitioner must identify the witness and relate both the substance of the witness' testimony and the efforts made to locate the witness. *Samples* at 1180.

In the case at bar, Petitioner has identified the lost witness as George Ray Hunt, Petitioner's former employer. Petitioner has also demonstrated to the court the general content of the lost witness' testimony and has shown that that testimony has a material connection to Petitioner's alibi defense. *See id.* at 1175. At the February 18, 1985 Criminal Session of the Superior Court of Bladen County, Judge Ellis presiding, Petitioner produced George Ray Hunt, the alibi witness who Petitioner claims he was unable to find before his trial in 1982. As a witness at the hearing on Petitioner's motion for appropriate relief, Hunt testified under oath that on the day Ms. Carlyle's store was robbed,

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2 Petitioner also claims to have suffered actual prejudice due to the prosecution's delay, because he lost the opportunity to receive a sentence which could be served concurrently with the unrelated sentence which he served from October 1979 to April 1981.

Petitioner worked for him at his business, Ray's Body Shop, from some time in the morning until about five or six o'clock in the afternoon. Hunt testified that Petitioner did not leave Ray's Body Shop after his morning arrival until the end of the work day around five or six o'clock. Petitioner was accused and convicted of robbing Ms. Carlyle's store at around 2:30 in the afternoon. Ray's Body Shop was located in Robeson County in the City of Lumberton. Ms. Carlyle's store is located in Bladen County at least two miles from the Bladen/Robeson County line.

Mr. Hunt stated that he remembered Petitioner having worked for him on the particular day in question because Petitioner was employed by Hunt on a part-time basis and usually came to work in the afternoons. However, on September 19, 1979, Petitioner came to work at Ray's Body Shop early in the morning because he had been unable to continue with his other job of driving a truck for the City of Lumberton since the truck he drove was not in working order during the early hours of the 19th. Mr. Hunt also testified that the fact that Petitioner's paycheck was larger than usual for the week ending September 21, 1979 corroborated his recollection of Petitioner having worked a longer day on Wednesday, September 19th. Judge Ellis found that Mr. Hunt's testimony tended to corroborate Petitioner's alibi and testimony that at the time of the robbery in question he was at work in Lumberton at Ray's Body Shop.

Ms. Carlyle, who testified at trial for the prosecution, testified that she recognized Petitioner to be one of the men who robbed her store. She also testified at trial that on a previous occasion at a preliminary hearing the defense attorney confused her and made her uncertain as to whether or not Petitioner was in fact the man who robbed her store. The defense attorney questioned Ms. Carlyle as to whether or not on that prior occasion she recalled having identified another man as the robber. Though Ms. Carlyle did not admit to identifying Petitioner's brother as the robber, she was nonetheless questioned about it before the jury. The defense attorney, Jack E. Carter, has sworn by affidavit that in open court at a preliminary hearing, Ms. Carlyle did identify Petitioner's brother, Bobby as the perpetrator who had held a gun on her during the robbery of her store instead of Petitioner who was also present in the courtroom.

Clearly had Hunt been available to testify at Petitioner's trial, the jury would have had to choose between his credibility and that of Ms. Carlyle. Believing Hunt would have resulted in Petitioner's acquittal. There is no evidence in the record which indicates to the court that in 1982 Hunt would have been any less or more credible than Carlyle. The respondents have pointed to their cross-examination of Hunt in which Hunt failed to remember any other details about Petitioner and the work week ending September 21st. For example, Hunt was unable to remember the exact hourly rate he was paying Petitioner for his work. However, Hunt's seemingly random recollections would normally go to the weight to be accorded to his testimony and to his credibility. Again, his memory does not appear to have been any better or worse than Carlyle's. Faulty memory alone is not a basis for having testimony excluded. As respondents point out in their brief, "The fact that . . .recollection [is] not especially dependable but sometimes correct and sometimes not is no more than the human condition and one of the reasons for cross-examination being allowed." Also the court notes that Carlyle was testifying **only three** years after the robbery at issue and she by her own admission suffered from faulty recollection. By comparison, Hunt was testifying about the day of the robbery more than **five years** later. If the passage of time could adversely affect Carlyle's memory, then it is certainly understandable that Hunt's memory of details that existed over five years ago could be less than perfect. Moreover, Hunt had no reason to fix the events of September 1979 as they related to Petitioner in his mind until the latter part of 1984 when, upon returning to North Carolina, he learned of Petitioner's predicament.

The court cannot explain why Hunt, Carlyle or anyone else remembers certain happenings and not some others; it is merely the nature of the human mind. Again, the weight to be accorded to the testimony of Hunt and Carlyle is within the province of the jury. It is for the jury and not the court to rank the witnesses and their testimony on a graduated credibility scale. In Petitioner's case, if Hunt had been available to testify at trial, the jury would have decided whether he and his testimony were credible.

Petitioner has shown that there is no question as to what the content of Hunt's testimony would have been. There is little doubt but that Hunt would have testified at Petitioner's trial if Petitioner had been served or indicted in the first few months after the warrant was issued for Petitioner's arrest; Hunt testified for Petitioner in 1985 after he returned to North Carolina and if Petitioner had been served with the arrest warrant at the completion of the investigation of the robbery at issue, Hunt, who then was still residing in North Carolina, would have been subject to the subpoena power of the North Carolina state courts.

Having identified the lost witness and having demonstrated the content of that witness' testimony, the petitioner must next show the efforts that were made to locate the lost witness. Petitioner has presented his efforts to locate Hunt to the court through the affidavits and testimony of his brother Stacy and his former attorney Jack E. Carter. Stacy Howell has testified that Mr. Carter asked him to try and find Hunt. He knew that Hunt was no longer operating Ray's Body Shop and so he checked with Charlie Matamoros, the only person that he believed might have knowledge of Hunt's whereabouts. Mr. Matamoros is Hunt's brother-in-law and he resides in Lumberton. Matamoros could only tell Stacy that Hunt was in Florida; he did not have an address for Hunt nor did he know the city or county of Hunt's Florida location. Mr. Carter testified to the court that he was first told about Hunt's being Petitioner's alibi witness in 1979. Carter made no attempts to find Hunt at that time because there was no warrant forthcoming and no charges on which to defend Petitioner. He agreed that at some time after Petitioner's arrest in 1982 he had Stacy try to locate Hunt. After the efforts through Stacy proved unsuccessful, Carter accepted that Hunt's testimony would not be available as evidence in the October 1982 trial of Petitioner.

> I did not move for a continuance of the case at trial because it would have been pointless. Continue it til when? We had had at that time from February to October to try and locate Mr. Hunt. The only lead that we could possibly come up with, or think of, had turned out to be a dead end. It would have been pointless to ask for a further continuance of the case, because I couldn't tell the Court what I could do during that continuation period. All efforts to find him that we knew of or that I could think of, or that Stacy Howell could relate to me, had been exhausted. Therefore, I was con-

vinced at that time that he was unavailable and would continue to be unavailable, whether the case was continued or not.

Transcript of Motion for Appropriate Relief at 47.

The respondents make much of the fact that Hunt has testified that his mother knew his Florida location and yet the Petitioner never contacted her in his attempts to find Hunt. However, there is no evidence that Petitioner or his brother knew Hunt's mother or even of her existence. In fact, Hunt testified that Stacy Howell did not know his mother. Respondents also question why Hunt's sister, who lived in Lumberton in 1982, was not approached by Petitioner in his attempt to find Hunt. Again, there is no evidence that Petitioner or his brother knew of Hunt's sister.3

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3 If this sister is married to Mr. Matamoros, Hunt's brother-in-law, then it would not have been unreasonable to assume that since Matamoros did not know Hunt's location, neither did his wife. Hunt testified that the only person he told of his whereabouts was his mother, although he knew of no reason why his mother would not have given his address to his sister.

Therefore, it appears to the court that Petitioner did make a reasonable and diligent effort to locate Hunt prior to his trial. Finally, the court notes the testimony of Detective Phillip Little. Little testified that he made "some attempts" to contact Hunt, but that his efforts were also unsuccessful. Little stated that his attempts were basically made in 1982 through inquiries of the Robeson County Sheriff's Department which was unable to provide any leads or any information as to how to find or contact Hunt.4

By providing the court with the specific and near certain evidence that Petitioner lost due to preindictment delay, Petitioner has established actual prejudice. Petitioner would have been acquitted if the jury had believed Hunt's testimony which refuted the allegation that Petitioner could have been present in Carlyle's store at 2:30 p.m. on September 19, 1978, the time of the robbery.

The court must now balance the prejudice to the defendant with the prosecution's reasons for the delay. In the instant case this is not a difficult task, because the respondents have offered but one simple reason for the twenty-seven month delay in serving Petitioner with the arrest warrant and no reason for the twenty-eight month delay in indicting Petitioner. The respondents have answered both in testimony at a

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4 There is some question as to when Detective Little knew of Petitioner's claim that Hunt was his alibi witness. Little testified that he was not sure, but that he believed it may not have been until after Petitioner was arrested in 1982. His notes do not indicate when he was told about Hunt. However, Little talked with Petitioner on November 1, 1979, the day the arrest warrant was issued, but he does not remember the content of their conversation. It is further noted that at the hearing on the motion for appropriate relief, the prosecutor asked Petitioner, "Do you recall that you never made any statement at all about Ray Hunt's Body Shop until November the 1st, 1979? To Mr. Little?" Transcript at 8. Petitioner replied that he thought he had told him about Hunt in October 1979. In any case, Detective Little does not claim to have interviewed Hunt back in 1979 while he was still in Lumberton.

hearing to dismiss[5] and by answers to interrogatories that prosecution in Bladen County was delayed because of pending charges against Petitioner in Robeson County. Bladen and Robeson officials decided not to serve the warrant for Petitioner's arrest until the complete disposition of the Robeson County charges. The Robeson County officials "did not want to have to release Petitioner for various Bladen court appearances and transport him back and forth during the pendency of their proceedings." Response to Interrogatories at 5. The general practice in Robeson County was to hold warrants until the other county was finished. Response at 15. It was for this reason that Detective Little did not attempt to serve Petitioner with the arrest warrant immediately after its issuance even though the detective knew that Petitioner was in the Robeson County Jail on the very day the arrest warrant was issued. During 1980 and 1981, Detective Little did not try to serve the warrant issued to him by the magistrate because Robeson was not through with Petitioner. Response at 4.

Bladen authorities made an informal agreement with the Robeson authorities whereby the Bladen officials were to be kept abreast of Petitioner's custody status; however, the failure to file a formal detainer had the dual effect of denying Petitioner the opportunity to demand to be tried pursuant to N.C.Gen.Stat. §15.10-2 and of allowing Bladen officials to "lose" Petitioner after he left the county jail. It is again noted that the record does not give any indication that Petitioner was aware of the outstanding warrant for his arrest until his actual arrest in 1982. Detective Little testified that after Petitioner had been released from state custody in April 1981, he (Little) was misinformed by the North Carolina Department of Correction that Petitioner had escaped and so no one made any attempt to serve Petitioner until February 4, 1982 when he was arrested after coming in to make a complaint with the Sheriff's Department in an unrelated matter. Following his arrest Petitioner was then indicted on March 22, 1982.

This delay both in serving the arrest warrant and in indicting Petitioner was the result of a conscious decision by Bladen County authorities. The only reason for the delay in serving the arrest warrant

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5 The hearing on Petitioner's motion to dismiss due to delay was on May 12, 1982, in the General Court of Justice, Superior Court Division, Bladen County, North Carolina, the Honorable Edwin S. Preston, Jr., Judge Presiding.

(an act which certainly would have started Petitioner's speedy trial clock), was an interest in conveniencing the Robeson County authorities. Convenience to prison and law enforcement officials cannot override a defendant's constitutional right to due process and a fair trial regardless of the fact that such a defendant is imprisoned on another matter.

The record establishes that respondents knew Petitioner's exact location from November 1979 until the end of March 1980 when he was removed from the Robeson County Jail and that respondents should be charged with knowledge of Petitioner's whereabouts from March 1980 through April 1981, the period of Petitioner's incarceration by the State Department of Correction. If respondents "lost" Petitioner after he was transferred from the county jail, it is their own fault for not filing a detainer with the Robeson County officials.

The record also establishes that by November 1, 1979 the prosecuting authorities had completed their investigation into the Carlyle robbery. By the first of November, all physical evidence had been obtained, the witnesses to the robbery had been interviewed, the prosecuting witness had identified Petitioner from a lineup, and Petitioner's location had been determined. Petitioner had never tried to evade authorities. There is no satisfactory excuse offered for the lack of diligence in serving Petitioner with the arrest warrant and for not indicting Petitioner at the next regular session of the grand jury.

The twenty-seven month delay in service of the arrest warrant meant that Petitioner's trial could not have been held until August 1982, i.e., thirty-three months after the commission of the offense. During the delay in prosecution, Petitioner lost all contact with his alibi witness who had left the state sometime in the early part of 1980. The court finds that respondents willfully neglected to prosecute their case against Petitioner causing Petitioner to suffer actual prejudice as discussed above in detail. Moreover, the prejudice suffered by Petitioner far outweighs the single reason of inconvenience offered by the respondents. *See Automated* at 403-04; *see also Sample* at 1181-1183 (discussion of the balancing test to be employed in preindictment delay cases). The completely unnecessary and unjustifiable delay by the prosecution in serving the arrest warrant and/or in indicting Petitioner transgressed the limits of due process because such delay was substantial enough to have cost Petitioner his right to a fair trial.

To try Petitioner under the circumstances discussed above does indeed violate the basic concepts of justice and the community's sense of fair play. Moreover, the court cannot give tacit approval to the

respondents' actions in this matter. In *Klopfer v. North Carolina*, 386 U.S. 213 (1967), the Supreme Court expressed its dislike for prosecutorial practices which have the effect of holding criminal charges over one's head for an indefinite period of time during which the person standing under those charges is absolutely powerless either to exonerate himself or to have the charges dismissed. In the instant case as long as Petitioner was not served with the arrest warrant and was not indicted he had no recourse as he was not in a position to demand that he be brought to trial.

Accordingly, IT IS RECOMMENDED that this petition for habeas relief be GRANTED and that the indictment against Petitioner in this matter be DISMISSED.

This the 8th day of March, 1988.,

/S/_____
ALEXANDER B. DENSON
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 86-1072-HC

WILTON HOWELL	)	
	)	
Petitioner,	)	
	)	
v.	)	**ORDER**
W. R. BARKER, et al.,	)	
	)	
Respondents.	)	

On 8 March 1988 Magistrate Alexander B. Denson filed his memorandum and recommendation1 in this petition for a writ of habeas corpus. From the recommendation that the writ be granted, respondents have timely filed objections. The court has fully considered the recommendation of Magistrate Denson and the objections thereto filed by respondents and is convinced that the well-reasoned analysis of Magistrate Denson is correct. Accordingly, the objections of respondents are overruled and the court adopts the recommendation of Magistrate Denson as its own.

The court does agree, however, that the remedy recommended by Magistrate Denson, though legal, appears to the court to be inappropriate. The court agrees with respondents that no reason is now apparent why petitioner would be prejudiced by a retrial.

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1 The memorandum and recommendation is attached hereto and incorporated herein.

The petition for writ of habeas corpus is, therefore, allowed, and a writ will issue.

This 29 March 1988.

/s/_____
W. EARL BRITT
United States District Judge